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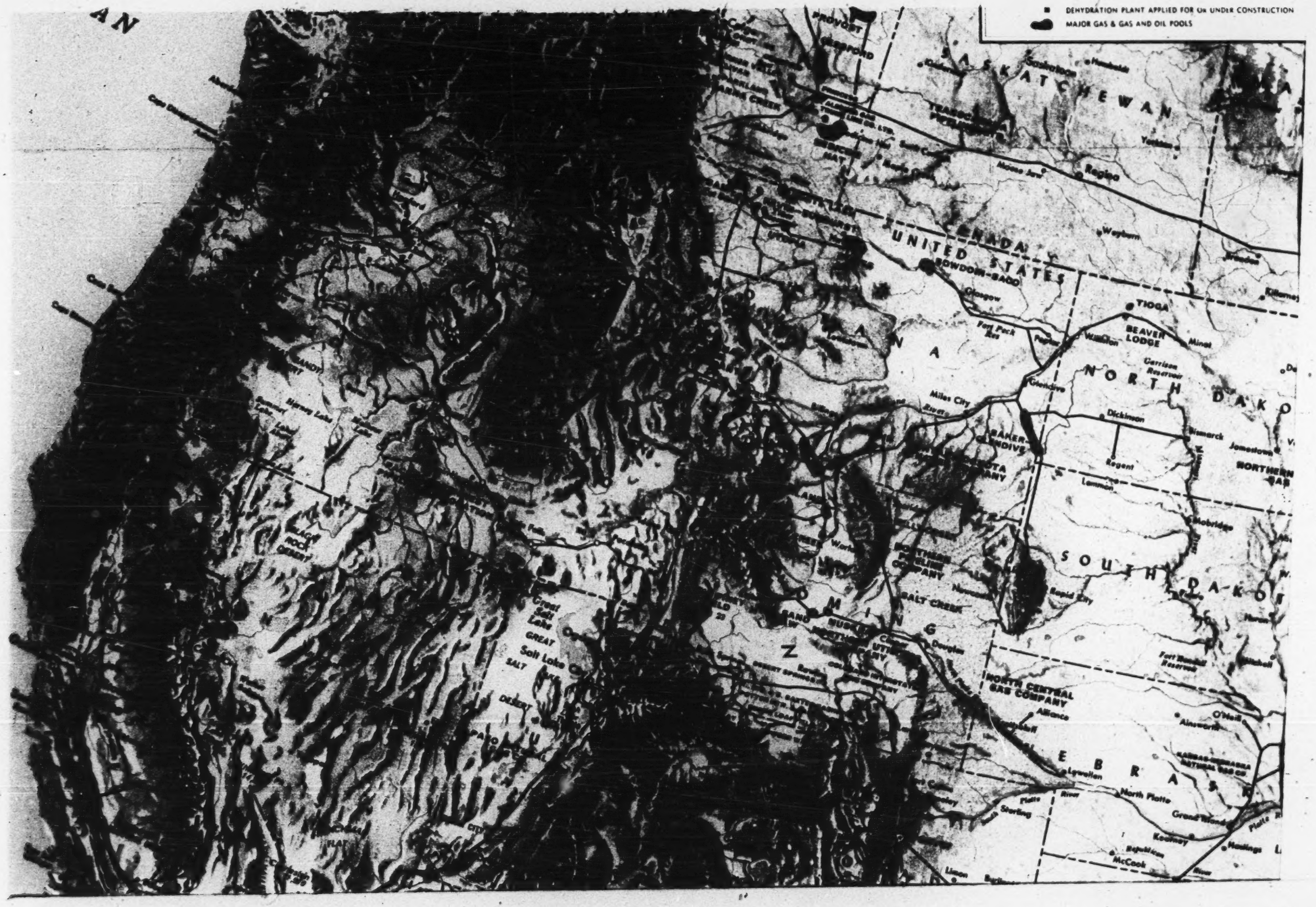

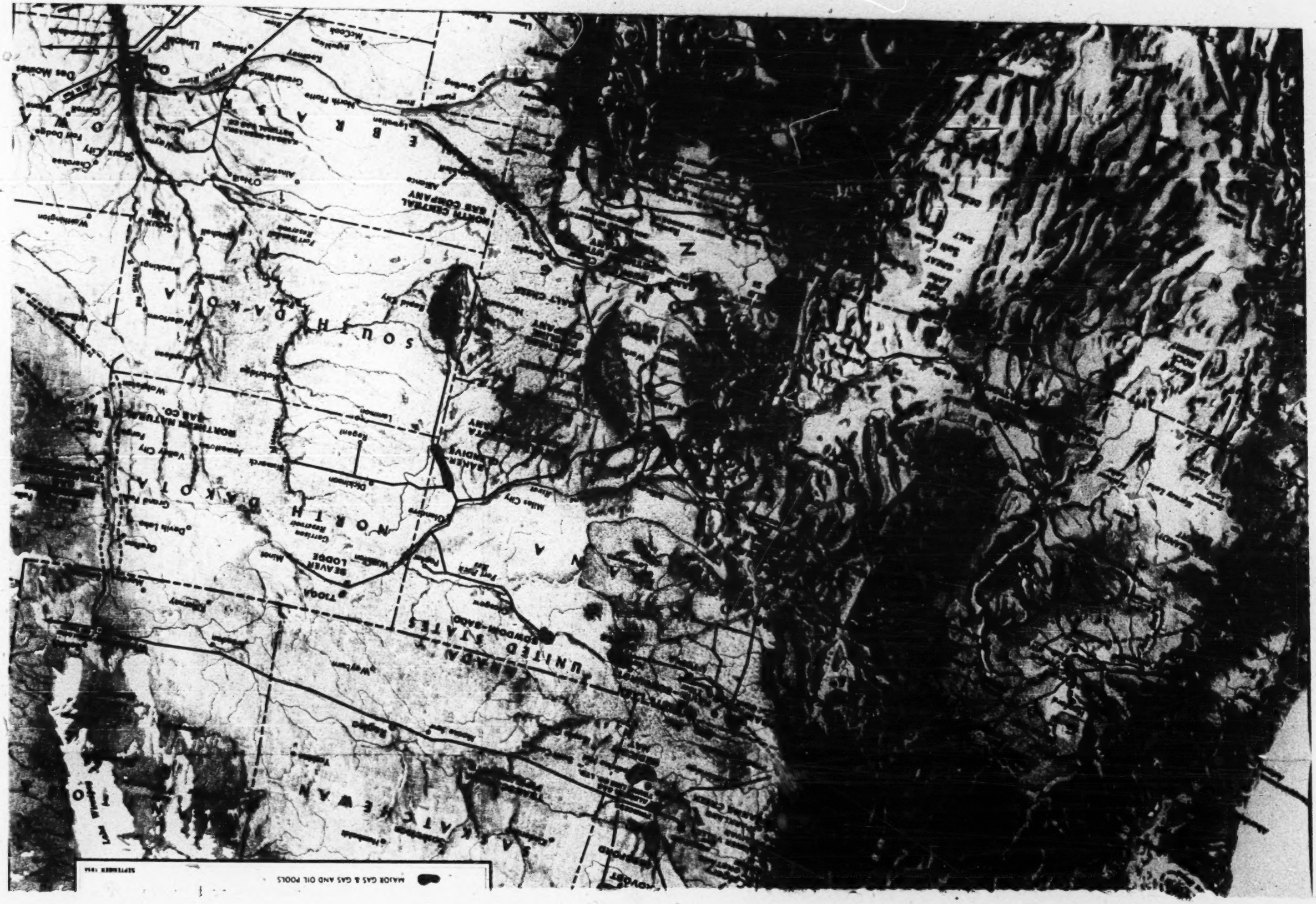
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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 187

PEOPLE OF THE STATE OF CALIFORNIA, PETITIONER

v.

FEDERAL POWER COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION

OPINIONS BELOW

The opinion of the court of appeals (R. 1434–1447) is not yet reported. The opinion and order of the Federal Power Commission (R. 1290–1310) are reported at 22 F.P.C. 1091, and the Commission's order denying rehearing (R. 1353–1358) is reported at 23 F.P.C. 350. The decision of the presiding examiner (R. 1149–1240) is reported at 22 F.P.C. 1102.

JURISDICTION

The judgment of the court of appeals was entered on March 30, 1961. The petition for a writ of certiorari was filed on June 28, 1961, and was granted

on October 9, 1961 (R. 1448; 368 U.S. 810). The jurisdiction of this Court rests on 28 U.S.C. 1254(1) and on Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

1. Whether the Federal Power Commission properly exercised its authority under the Natural Gas Act, in approving a merger of the assets of two natural gas companies, at a time when there was pending in the district court an unresolved but continued suit which challenged the prior acquisition by one of the companies of substantially all of the outstanding stock of the other as a violation of Section 7 of the Clayton Act.

2. Whether, in finding that the asset merger satisfied the public convenience and necessity standard of the Natural Gas Act, the Commission adequately inquired into and weighed the economic impact of the merger in terms of all the relevant policies, including those reflected in Section 7 of the Clayton Act.

3. Whether the proceedings leading to the Commission's approval of the merger, and the approval itself, denied petitioner a fair hearing.

STATUTES INVOLVED

1. Sections 7(c) and (e) of the Natural Gas Act, 52 Stat 825, as amended, 56 Stat. 83 and 61 Stat. 459, 15 U.S.C. §§ 717f(c) and 717f(e), provide as follows:

> (c) No natural-gas company or person which will be a natural-gas company upon comple-

tion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the

procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U.S.C. § 717f(c)]

* * * * *

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public

convenience and necessity may require. [56 Stat 84 (1942); 15 U.S.C. § 717f(e)]

2. Section 7 of the Clayton Act, 38 Stat. 731, as amended, 64 Stat. 1125–1126, 15 U.S.C. § 18, provides as follows:

§ 18. Acquisition by One Corporation of Stock of Another

No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, wherein any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

* * * * *

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal

Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission in the exercise of its jurisdiction under section 79j of this title, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board.

STATEMENT

This case involves the validity of an order of the Federal Power Commission under Section 7 of the Natural Gas Act (*supra*, pp. 2–5) authorizing El Paso Gas Company ("El Paso") to acquire and operate the properties of Pacific Northwest Pipeline Company ("Pacific"). Both companies are engaged in the transportation and sale for resale of natural gas in interstate commerce in the Pacific Coast area. The Commission's order was affirmed by a divided court of appeals.

A. BACKGROUND OF THE MERGER

1. *Description of the companies and their operating relationships before the merger.*

a. El Paso.—El Paso's principal transportation facilities constitute a single integrated natural gas pipeline system (R. 1291). Its principal sources of natural gas are the Permian Basin in western Texas and southeastern New Mexico, and the San Juan Basin in northwestern New Mexico and southwestern Colorado (R. 1163).[1] It operates pipelines from each of these

[1] El Paso also obtains gas from other fields in this country and from Canada (R. 1163).

basins to the California border. Its main lines from the Permian Basin, known as its "Southern System," extend across the southern portions of Texas, New Mexico, and Arizona; its "Northern System" runs from the San Juan Basin across the northern portion of Arizona (*ibid.*). The gas obtained from the Permian Basin is so-called "residue gas" (*i.e.*, gas obtained from oil wells), while the San Juan basin produces gas obtained from gas wells ("dry gas") (*ibid.*). The Commission authorized the construction and operation of El Paso's Northern System to enable the company to have a source of dry gas that would balance its utilization of residue gas from the Permian Basin (R. 1163).

Although El Paso had important markets in west Texas, New Mexico, Arizona, and Nevada, the rapid growth of the company since it was first certificated by the Commission in 1944 resulted largely from expansion of the California market.[2] More than three quarters of its certificated sales are to the California market; at the time of the merger, it was—and had been for a number of years—California's sole out-of-state supplier (R. 1161–1162).

b. Pacific.—Pacific was certified by the Commission in 1954 to construct a pipeline to serve the Pacific Northwest, described as "the one remaining large area of this country with a great need for natural gas but which is still without this highly desirable fuel and raw material." *Northwest Nat-*

[2] El Paso first entered the California natural gas market in 1946 (R. 1160).

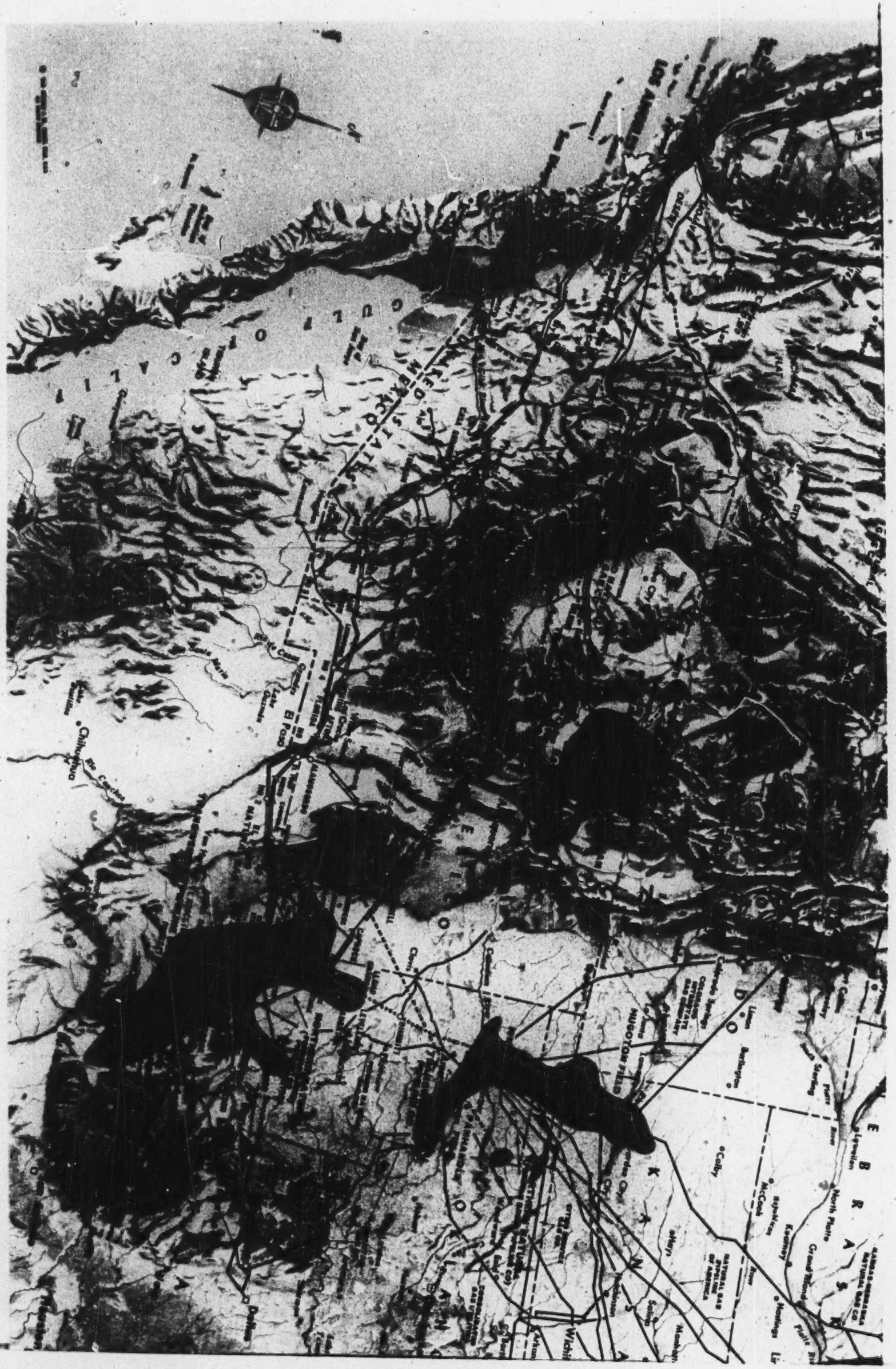
ural Gas Co., 13 F.P.C. 221, 235; R. 1167. Prior to its merger with El Paso, Pacific owned and operated a pipeline system commencing at Ignacio, Colorado, in the San Juan Basin, where it was interconnected with El Paso's Northern System, and extending through the States of Colorado, Utah, Wyoming, Idaho, Oregon, and Washington to its northern terminus at Sumas, Washington. Pacific produced natural gas from its own leaseholds and purchased gas from other producers in the San Juan Basin and in various fields in the Rocky Mountain area. It also purchased gas from Westcoast Transmission Company, Ltd. ("Westcoast"), a Canadian company, at the Canadian border (R. 1292). Pacific was authorized to sell gas in all the States through which its pipelines extended (R. 1167). Pacific was never authorized to sell, and never sold, in California (R. 1165–1167, 1185–1186, 1292). In 1958 (the last full year for which data were available at the hearing), Pacific's sales were only about 500,000 Mcfd out of its system capacity of 646,000 Mcfd (R. 1166).

c. Operating relationships between the companies.— Pacific's primary load obligations are at the northern end of its system, while those of El Paso are in the California market (R. 1162, 1169). Prior to the merger, El Paso and Pacific had various agreements for the interchange of gas between their systems. In 1954 and 1955, El Paso agreed to purchase natural gas from Pacific that the latter obtained from Canada (R. 1168–1169). In June 1956, the companies agreed to joint use of their combined gathering facilities in

the San Juan Basin, and to deliver to each other, on an exchange basis, natural gas from wells located closer to each other's respective transmission facilities. This agreement avoided unnecessary construction of gathering facilities in the Basin, and resulted in estimated savings of $4,500,000 for Pacific and $250,000 for El Paso (R. 1170). In the same month, the companies entered into another agreement by which El Paso made available to Pacific gas from the San Juan Basin which was temporarily in excess of its requirements, and Pacific agreed to deliver equivalent quantities of gas to El Paso in the future. Through these loans of gas, Pacific was able to obtain early deliveries of gas into its pipeline system, to reduce substantially its program for immediate production of gas, and to spread its drilling expenditures over a longer period of time (R. 1170).

2. *El Paso's acquisition of Pacific's stock, and the antitrust suit directed against such acquisition.*

a. The stock acquisition.—Late in 1954, El Paso, in connection with the negotiation of a contract to purchase Canadian gas from Pacific, became interested in acquiring Pacific. Pacific insisted that the transaction take the form of a purchase of stock, so that it would be tax free (see, *e.g.*, R. 265), whereas El Paso preferred a merger of assets that would be authorized by the Commission (R. 1171). During this period the Commission did not assert jurisdiction over the stock acquisition. See pp. 34, 50-51, *infra*. Pacific refused to accept an asset merger, because it was then at a crucial stage of its initial financing and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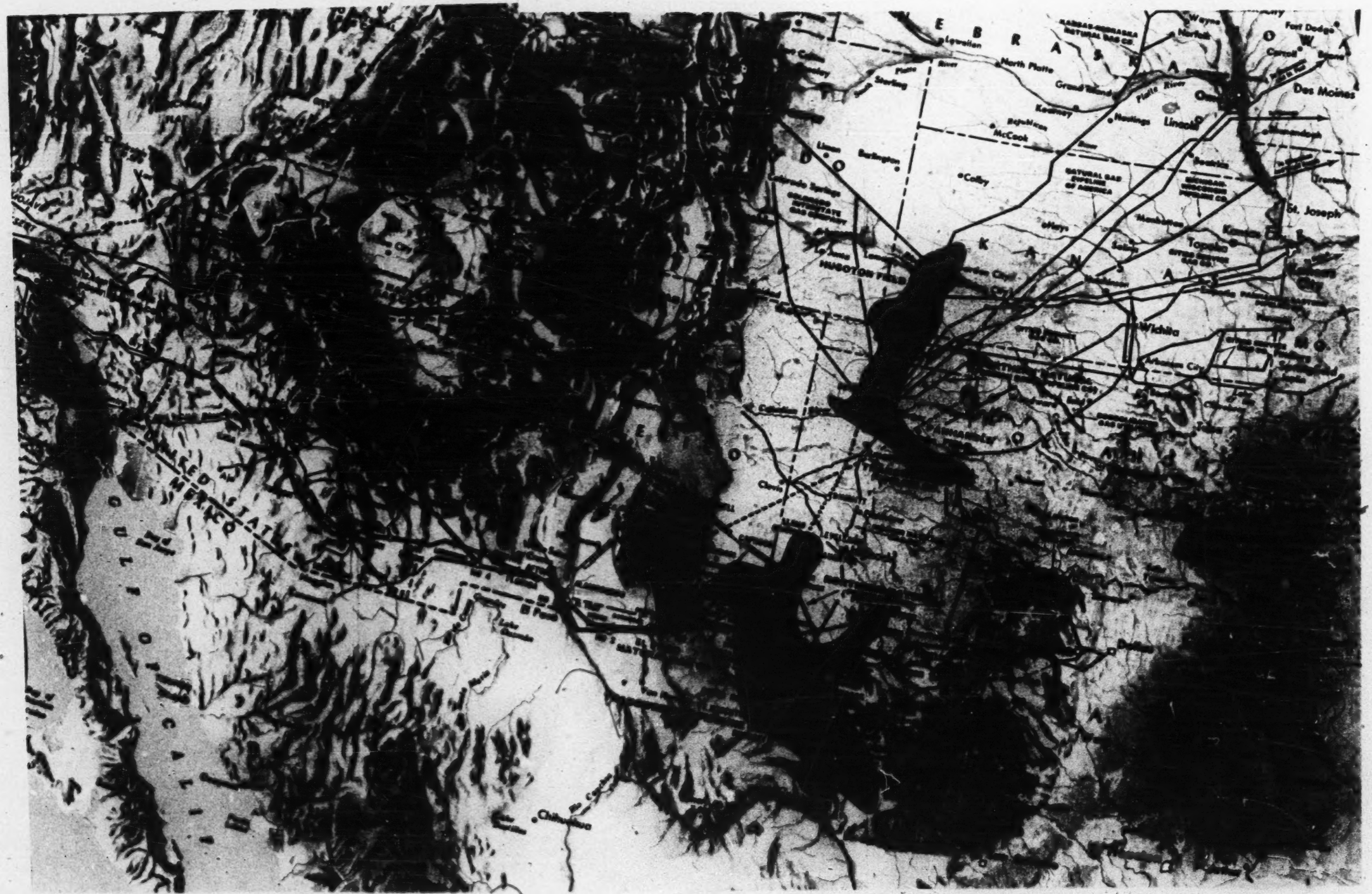
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COLORADO
NEW MEXICO

was of the view that a protracted merger hearing before the Commission would preclude a successful public sale of its securities (R. 64–65, 266–267). The merger discussions broke down, were resumed late in 1955, and ended in February 1956 (R. 1171).

The discussions were again resumed in August 1956, and this time El Paso agreed to an exchange of stock (R. 1172). On January 8, 1957, El Paso made an offer to Pacific's stockholders to exchange their stock for that of El Paso (R. 1172). By the end of January, more than 80 percent of Pacific's stock had been tendered for exchange; when the exchange offer was closed on May 1, 1957, El Paso had acquired 99.8 percent of Pacific's outstanding stock (R. 1172). As the examiner noted (R. 1172–1173), "El Paso's President testified that the primary purpose for the acquisition of the common stock of Pacific was to gain access to the vast and relatively untouched Canadian reserves for El Paso's markets, and that the next purpose in importance was gaining access to the reserves of the Rocky Mountain area" (see R. 17–18).

Within two months after completion of the stock acquisition, El Paso concluded that the properties of the two companies should be integrated (R. 21, 359–360).[3] Among the practical reasons for merging the assets were: public relations problems that would arise because of inter-company transactions, difficul-

[3] El Paso proposed to merge Pacific into it, to dissolve Pacific in accordance with Delaware law, and to succeed to all of its rights and assets and to assume all of its obligations and liabilities (R. 1099–1100).

ties of relations with minority stockholders of Pacific, increased expenses when financing of a subsidiary is handled separately from that of the parent, and "possible threats" of legal action being taken against the merger by federal or State authorities (R. 361–370). There is no question but that El Paso's "ideas on that [merger] were considerably stimulated by the fact that the attorney general of the United States was preparing to file an anti-trust suit against us" (R. 142–143). On July 16, 1957, the boards of directors of both companies authorized the filing of an application with the Commission by El Paso to acquire the assets of Pacific by merger (R. 1182–1183). The application (R. 1087–1110) was filed on August 7, 1957 (R. 1183).[4]

b. The antitrust suit.—Prior to the filing of the merger application, however, the United States on July 22, 1957, filed an action in the district court challenging the stock acquisition as illegal under Section 7 of the Clayton Act. *United States* v. *El Paso Natural Gas Co., et al.*, D. Utah, Central Div., Civil No. 143–57. The suit sought an adjudication that the acquisition violated Section 7, and an order directing El Paso to divest itself of the stock (R. 1176).

Shortly after filing their merger applications with the Commission, El Paso and Pacific filed a motion in the district court to dismiss the Clayton Act suit,

[4] At the same time, Pacific filed an application to abandon its properties, facilities and services in order to complete the merger (R. 1153). The Commission denied the application as inappropriate, since Pacific's business was not being abandoned, but transferred (R. 1228–2131).

or, in the alternative, to stay the suit pending determination by the Commission of the applications for approval of the merger of assets. The theory of the motion was that the filing of the applications with the Commission gave that agency primary jurisdiction to pass upon the issues raised in the Clayton Act suit. The district court denied the motion, and this Court denied a motion by El Paso and Pacific for leave to file a petition for an extraordinary writ of certiorari to review that ruling. See *El Paso Natural Gas Co.* v. *United States*, 355 U.S. 950, No. 365 Misc., O.T., 1957.

In May and June 1958, the Assistant Attorney General in charge of the Antitrust Division wrote the Chairman of the Commission four letters requesting that the Commission proceeding be stayed pending the outcome of the antitrust suit. On July 29, 1958, the Chairman advised the Assistant Attorney General that the public utility commissions of four states had requested an early hearing, and that the Commission would not stay its proceedings. He invited the Antitrust Division to participate in the Commission proceedings to whatever extent it deemed necessary, and to submit any information it regarded as likely to be helpful to the Commission. The Antitrust Division neither participated in the proceedings nor submitted any information to the Commission.[5]

[5] These letters between the Commission and the Antitrust Division are not part of the record. If the Court wishes to see them, however, we shall lodge copies with the Clerk.

The hearings before the Commission began on September 17, 1958 (R. 1177),* and the applicants' principal case was presented. The hearings were then recessed to November 12, 1958, for cross-examination of the applicants' witnesses and presentation of evidence by the opponents of the merger.

On October 2, 1958, El Paso and Pacific moved in the district court for a continuance of the Clayton Act case. On October 6, 1958, the Department of Justice wrote the Commission requesting it to postpone the examiner's hearing (scheduled to reconvene on November 12, 1958) pending the final outcome of the antitrust case, which was then set for trial on November 17, 1958. In response to this letter the Commission, on October 7, 1958, wrote the district court that, if the court were to deny El Paso's motion of October 2 for a continuance and to proceed with the antitrust trial, the Commission would continue its merger proceedings to a date which would not conflict with the court trial date; but that if the court granted El Paso's motion, the Commission would proceed with its hearing. On October

*A number of parties had intervened in the Commission proceedings, including petitioner, the State of California (R. 1154–1155). On September 8, 1958, California moved the Commission to stay its proceedings until the antitrust case had been completed (R. 1135–1147). It stated (R. 1138) that there was "no question that both the Court and the Commission have jurisdiction of the matter pending before each" (R. 1138). The Commission, noting that the Public Utility Commissions of Washington, Oregon, Nevada, and New Mexico had requested an early hearing, and concluding that such early hearing "will be in the public interest," denied California's motion on September 15, 1958 (R. 1147–1148).

13, 1958, the district court continued the antitrust suit until the final decision in the Commission proceedings. R. 1177–1178.[1]

3. *The administrative proceedings.*

Hearings before the examiner began on September 17, 1958, and ended on January 6, 1959 (R. 1153). Eleven States, and eight of the intervening customers, supported the merger (R. 1155–1156). The only intervenors opposing it were the State of California and a stockholder of Pacific (*ibid.*).

On November 20, 1959, the examiner issued his decision approving the merger, subject to certain record-keeping and accounting requirements (R. 1149–1240). On December 23, 1959, the Commission "adopted," with certain modifications, the examiner's decision "as the decision of the Commission" (R. 1290–1310); issued to El Paso a certificate of public convenience and necessity authorizing it to acquire and operate all of the facilities of Pacific (R. 1307); and directed that the merger be consummated within 30 days (R. 1308). The merger was consummated on December 31, 1959 (R. 1339). On January 20, 1960, California filed a petition for rehearing and for stay of the order of December 23, 1959 (R. 1340–1351). The Commission denied the petition on February 17, 1960 (R. 1353–1358).

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[1] Although the Commission's letter of October 7, 1958, to the district court is not part of the record, it is referred to in the district court's order of October 13, 1958 (R. 1177–1178). It is reprinted in Appendix A, *infra*, pp. 75–77.

B. THE DECISION OF THE COMMISSION

In approving the merger, the examiner wrote a lengthy opinion (R. 1149–1240) which, with certain modifications not here pertinent, the Commission adopted as its decision (R. 1310). The Commission also wrote its own opinion (R. 1290–1307) which discussed the exceptions to the examiner's.

The examiner explained the consideration that the Commission is required to give to the policy of Section 7 of the Clayton Act in passing upon asset mergers under Section 7 of the Natural Gas Act; and discussed the effect of the merger upon competition in both the sale and the purchase of natural gas. He also set forth in detail four specific areas in which he found that the merger would be in the public interest.

1. *The effect of the merger on competition.*

The examiner ruled (R. 1178) that, among the factors to be considered in determining whether the proposed merger is in the public interest, is "whether the evils sought to be prevented or restrained by Section 7 of the Clayton Act, are found by record evidence to be present here, and to be such as to render inimical and repugnant to the public interest the merger here sought to be approved." He stated (R. 1179) that, although the Commission need not determine "whether there is technically a violation of the Clayton Act under the facts here established," it has "the unmistakable duty" to "consider such evils to whatever extent they may be shown by substantial evidence to result from the merger of Pa-

cific into El Paso, and to weigh them carefully in relation to the public interest, so as to make a truly fair determination of whether, in spite of their presence, there are other factors shown to exist, which preponderate in establishing that the merger 'is or will be required by the present or future public convenience and necessity.'" The examiner concluded (R. 1183) that the 1950 amendment of Section 7 of the Clayton Act, which "made inapplicable its provisions to 'transactions duly consummated pursuant to authority given' by the Commission, acting within its powers * * shows a positive legislative intent to permit mergers of natural gas companies, when found by the Commission to be in the public interest, even in the presence of the things sought to be prevented by the Clayton Act."

The examiner found (R. 1185–1186) that, prior to the merger, the only market for the sale of natural gas in which there had been any actual or potential competition between El Paso and Pacific was the State of California; and that although Pacific "was a potential competitor for a share of this market * * * [i]t cannot be found from any evidence in this record that Pacific was at any time a real competitor for a share in the California market." The examiner referred (R. 1186) to the testimony of the president of Pacific that, prior to the stock acquisition, "he never gave much thought to the sale of gas in California because such sales never were 'close enough to reality'" (see R. 446); and he found (R. 1187) that "Pacific, standing alone as a separate corporation, did

not have the financial capacity to compete seriously for any share in the California market."* The examiner also pointed out (R. 1187–1188) that the Commission recently had authorized another company to construct a pipeline to California, and that an application by a third company was pending before the agency; and he stated (R. 1192) that these two new companies "will offer considerably greater and stronger competition to El Paso than Pacific could possibly have offered as a separate corporation

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*The examiner noted (R. 1186) testimony by the president of Pacific that he began negotiations in 1956 with Southern California Edison Company ("Edison") for the sale of natural gas to it; that, in order to make the construction of a pipeline by Pacific feasible, it would also require contracts to sell gas to the two other utilities in California, one of which was Pacific Gas and Electric Company ("PG&E"); and that although Pacific also began negotiations with PG&E, those negotiations failed, presumably because PG&E had plans to build its own pipeline to Canada.

The record shows that the pipeline could have been financed only if Edison would have purchased at least 300 million cubic feet of natural gas daily, either alone or with other distribution companies (R. 244). Since Edison could not take that amount, the participation of PG&E was essential (R. 245, 247–248, 261–262, 308). But PG&E from the first refused to participate (R. 247), because it was interested in its own Canadian project (R. 247–248, 270). El Paso itself failed to interest PG&E in a similar project, apparently for the same reason (R. 308).

After Edison rejected the Pacific proposal, El Paso entered into a contract with Edison and Southern California Gas Company to sell them 100 million cubic feet per day, to be delivered at Topock, Arizona, on the California border. The contract provided for the future delivery of up to 300 million cubic feet daily, if gas were available to El Paso. The price was 30¢ per Mcf (R. 124–128).

The preliminary discussions between Pacific and Edison had not set a delivered price for Pacific's gas, but envisioned a price

* * *."[9] The examiner concluded (*ibid.*; see, also, R. 1189) that "[t]he public interest will not be hurt by the elimination of Pacific as a competitor for natural gas sales in California or elsewhere."

With respect to the effect of the merger on competition in the acquisition of natural gas, the examiner stated (R. 1194) that "Pacific will be eliminated * * * as a competitor for available gas reserves in producing fields economically accessible to both it and El Paso." He found (*ibid.*) that Pacific would definitely be a competitor in the San Juan Basin, in the Aneth Field and in several fields in the Rocky Mountain area; that it would also be a competitor for the purchase of Canadian gas; but that, with its existing pipeline system, it could not compete strongly with El Paso for natural gas reserves in the Permian Basin or in the Panhandle-Hugoton Field. The examiner concluded (R. 1195), however, that the elimination of Pacific as a competitor for the purchase of gas in the producing fields "is not of great consequence when [as here] there remain other strong com-

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of not more than 25 cents (the cost of gas at the Canadian border) plus "a reasonable transportation charge" to California (R. 246). In order to transport the gas, Pacific would have had to invest $75 to $80 million in new lines (*ibid.*). Thus, the transportation would probably have brought the delivered price up to 45 cents to 50 cents. This was so much higher than the 30-cent price offered by El Paso that, if Edison were interested at such a higher price, it would have encouraged El Paso to purchase gas "to satisfy that kind of demand" (R. 126–127, 279).

[9] Petitioner did not object to the introduction of the evidence upon which the findings as to the competition of the two other companies was based. E.g., R. 46, 131–135, 146–147, 176, 200–203, 304–305, 346–351, 564.

petitors for gas in all producing fields to which the unified company will have access. Such elimination of Pacific will do no real harm to the public interest."

The examiner concluded (R. 1195) that any lessening of competition, either in the consumer markets or the producing fields, "does not create any obstacle to approving the merger," since "[t]here are other factors of greater importance showing this merger to be required by the public convenience and necessity which indeed far outweigh this single factor of the elimination of Pacific as a competitor of El Paso or any other natural gas company."

In overruling the exceptions to the examiner's holding that the effects of the merger on competition did not call for its disapproval, the Commission stated (R. 1295–1296):

> * * * What we are attempting to arrive at is the public convenience and necessity. In reaching our determination, we do not have authority to determine whether a given transaction is in violation of the Clayton Act, but we are required to consider the bearing of the policy of the antitrust laws on the public convenience and necessity. *City of Pittsburgh* v. *F.P.C.*, 237 F. 2d 741, 754 (CADC). With the presiding examiner, we find that any lessening of competition whether in the consumer markets or the producing fields, does not prevent our approving the merger because there are other factors which outweigh the elimination of Pacific as a competitor. In any case, it appears that any lessening of competition is not substantial.

2. *The benefits of the merger to the public interest.* The examiner found—and the Commission specifically agreed with him (R. 1297–1305)—that the merger would serve the public interest by providing (a) an improved supply of gas and better utilization of gas reserves, (b) a financially stronger gas supplier, (c) expanded and improved gas service, and (d) lower rates.

a. Improved gas supply and utilization of gas reserves.—The examiner stated (R. 1196) that the issue of adequate natural gas supplies for the markets involved was of "paramount importance" to the decision on the public interest. He pointed out (R. 1197) that California's own production of natural gas has been "greatly inadequate" for years and "continues to diminish," and that although three pipeline companies are proposing a substantial increase in the amount of out-of-state gas to be supplied to California, the State's steadily expanding population and industry will bring still further demands in future years. The examiner noted (R. 1198) that California's principal out-of-state gas sources are older fields, and that a supplier of gas to extensive and expanding markets should, if economically feasible, obtain gas from newer and less depleted sources. He stated (R. 1198–1199) that El Paso needs additional gas supplies "to meet the existing and foreseeable demands of its markets," and that it needs the additional supplies of gas that its acquisition of Pacific would provide "if it would have that healthy relationship between gas supply and gas requirements

required by the public interest." The examiner pointed out (R. 1200) that there are immediately available to Pacific "substantial supplies of natural gas from Canada and the Rocky Mountain area, which are presently in excess of the needs of its markets and which could be made available to the California markets practically immediately for any emergency, or for additional regular supplies." He also concluded (R. 1204) that, with the attachment of El Paso's markets to the merged system, exploration and development in the potentially productive Rocky Mountain areas which the Pacific pipeline crosses should be stimulated.

The examiner also found (R. 1205–1209) that the merger would help El Paso in solving its problem of residue gas (obtained from oil wells). While the marketing of such gas is in the public interest as a conservation measure—otherwise it would be flared, as was formerly done on a large scale (R. 317)—the amount of such gas available depends upon oil output, and the latter is in turn controlled by various state regulatory agencies. About half of El Paso's 1957 sales consisted of residue gas, and the Commission has recognized the importance to El Paso of developing an adequate supply of dry gas. Pacific would provide El Paso with such a source; less than seven percent of Pacific's sales in 1957 consisted of residue gas. The use of Pacific's dry gas in the El Paso system would not injure Pacific, the examiner found, because the latter's system is operating below capacity. In addition, since the life of the average dry

gas well is longer than that of the average oil well, El Paso, by having greater dry gas reserves, will have a longer life on its total reserves, and will thus be able to market bonds of longer maturity and at a lower capital cost.

b. A financially stronger gas supplier.—The examiner pointed out (R. 1209–1212) that Pacific had sustained substantial operating losses in 1957 and 1958, and that it appeared that it would be unable to cover its preferred stock dividends in 1959. Its financial difficulties have curtailed its expenditures for development, both for gas supplies and for markets, and thus have deprived segments of the public of natural gas service. While Pacific might have survived as a separate company and become financially sound, such improvement would have been slow, the examiner concluded, and its financial position would become much stronger as a result of the merger. The merged company, unlike Pacific standing alone, "should be able to attract debt and equity capital readily and upon quite favorable terms" (R. 1215). The merger will aid El Paso financially by permitting it to utilize, for federal income tax purposes, a loss carry-over of $23,734,923, representing Pacific's net operating losses prior to January 1, 1957, which El Paso could not utilize if it were merely the owner of Pacific's stock (R. 1212). Since such operating losses may be carried forward for only five years, and since Pacific will probably not have sufficient income within such period against which to offset "any great part of the carryover," Pacific as a separate

corporation "could not have nearly the full benefit" of that amount (R. 1212–1213).

c. Expanded and improved gas service.—The examiner found (R. 1215) that the natural gas market in the State of California will continue to expand, and that "greater quantities of imported natural gas will be needed in California in addition to all sales thereof now certificated by the Commission or for which certification by the Commission is now sought." He pointed out (R. 1217) that El Paso cannot increase its daily deliveries of gas in the area by any great quantities without an additional source of supply, and that Pacific will provide that source. He also noted (*ibid.*) that although Pacific, because of its weak financial position, "would not soon be in a position to propose new projects to supply California," El Paso could do so. In addition, the examiner found (R. 1218–1219) that Pacific's present customers would have the benefit of not having to bear alone the costs of long hauls of natural gas, and also of service to areas traversed by Pacific's pipelines which Pacific is not serving but which El Paso intends to serve. Finally, he stated (R. 1220–1222) that the merger would result in flexibility of operation, *i.e.*, that "by central control of the operation of the entire unified system, the flow of system gas may be directed at all times to points of need on the system"; and that such flexibility is important in meeting shortages of gas anywhere in the system.

d. Lower rates.—The examiner stated (R. 1224–1225) that, as a result of certain operating economies

to be achieved through the merger, lower rates are likely. No rates presently on file by either company will be changed as a result of the merger (R. 1175, 1227). The examiner pointed out (R. 1226) that existing rates of the merged system can be changed only by a proceeding under Sections 4 and 5 of the Natural Gas Act, and he concluded (R. 1227) that evidence relating to future rates of the merged system was "irrelevant to the basic issue of whether the merger is in the public interest."

The Commission concluded in its opinion that the merger would "result in savings that will tend to lower rates or prevent them from rising more than they would otherwise" (R. 1303). It noted (R. 1303–1304) that the "strongest motive" for attacking the examiner's decision apparently was the fear that the higher costs on the Pacific system would be "rolled in" to the single system, to the detriment of El Paso's existing customers in California who presently enjoy the benefit of El Paso's lower costs. To avoid this possibility, the Commission directed El Paso to maintain its accounts in such a way as to allocate costs as between the El Paso and Pacific segments of the merged system so that, in future rate cases, the costs arising on the Pacific part of the system could be readily identified (R. 1304, 1308–1309). The Commission also required El Paso to credit to a special reserve, for the benefit of consumers, the tax savings resulting from the use of Pacific's loss carryover by the merged company (R. 1300–1301, 1309–1310; see *supra*, pp. 22–23).

C. THE DECISION OF THE COURT OF APPEALS

Only the State of California sought judicial review of the Commission's order of December 23, 1959. In its petition for review (R. 1361–1365), California specified numerous errors which, as distilled by the court of appeals, were as follows (R. 1438): (1) the Commission did not give sufficient or proper attention to the impact of the merger upon future rates to customers; (2) the Commission failed to give proper attention and effect to the policies and terms of the antitrust laws; and (3) California was denied due process in that the examiner failed to examine documents filed in evidence.

El Paso intervened as a party respondent in the court of appeals and appeared in support of the merger. With the Solicitor General's authorization,[10] the Department of Justice, on behalf of the United States, filed a brief *amicus curiae* because of the possible impact of the Commission's action upon the enforcement of the antitrust laws and of the possible effect of the Commission's order upon the Clayton Act suit pending in the Utah district court. As *amicus*, the United States urged that the Commission's order be vacated and the cause remanded with instructions that the Commission either deny the application or await the outcome of the Clayton Act suit.

The court of appeals affirmed, in an opinion by Judge Prettyman, joined by Mr. Justice Burton.

[10] Rule 18(j) of the Court of Appeals, prior to January 16, 1961, required that briefs *amicus* filed by the United States be "sponsored by the Solicitor General."

With respect to California's contention that the Commission failed to give sufficient or proper attention to the impact of the merger upon future rates, the court agreed with the Commission that its forecast that operating costs would be reduced in the long run, taken together with the condition preserving for a future rate case the actual allocation of costs as between the two underlying systems, made inquiry into specific future rates unnecessary at that time (R. 1438–1441). With respect to the contention that the Commission's approval of the merger was, in part, based upon the erroneous premise that under Section 7 of the Clayton Act[11] its approval would immunize the merger from liability under the Clayton Act, the court noted that the Commission had no authority to pass upon the issue and had not purported to do so. The court, however, agreed with the Commission that, in passing on a merger application under Section 7(c) of the Natural Gas Act, the Commission must give heed to the policies and provisions of the antitrust laws and held that the Commission had sufficiently considered them in this case (R. 1441–1445). Finally, California's due process argument was determined to be without merit (R. 1445).

Judge Fahy, although dissenting, agreed with most of the majority opinion. The point of departure was not over the merits of the Commission's order

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[11] "* * * Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the * * * Federal Power Commission * * * under any statutory provision vesting such power in such Commission * * *."

or the legality *vel non* of the merger, but over the propriety of the Commission's approval of the asset merger when the legality of the stock acquisition was being challenged in the Utah district court. Agreeing with the position espoused by the United States as *amicus*, Judge Fahy would have vacated the Commission's order with instructions to deny the application for approval or await the outcome of the antitrust litigation (R. 1445–1447).

SUMMARY OF ARGUMENT

I

The principal question in this case is whether the Federal Power Commission, in proceeding to a decision upon the legality of the asset merger at a time when the legality of the antecedent stock merger had been challenged before the district court in the Clayton Act suit, and in considering the policies of the antitrust laws in approving the merger under the standards of the Natural Gas Act, properly accommodated the policies of those two statutes. In the Introduction to Point I of our argument (*infra*, pp. 31–37), we have epitomized the interrelation of those policies. Our conclusion is that the Federal Power Commission committed no error of law in accommodating its proceedings under the Natural Gas Act to the policies and enforcement of the Clayton

Act. Our argument is that the plenary authority given to the Commission by the Natural Gas Act indicates that its regulatory powers are not superseded by the filing of an action for violation of Section 7 of the Clayton Act; that the action of the Commission in approving the merger under the Natural Gas Act did not foreclose prosecution of the Clayton Act suit; that the Commission applied proper standards in evaluating the effect of the merger upon the public convenience and necessity; and that its findings that the merger is in the public interest are supported by substantial evidence.

II

The Commission gave proper consideration to the effect of the merger upon the rates of the merged system. The Commission concluded that, as a result of various economies which the merger would produce, it would result ultimately in lower system rates, rather than, as petitioner contends, in higher rates within the State of California. The Commission required El Paso to maintain its accounts so that, in any future rate proceeding, the costs arising on the Pacific segment of the merged system could be readily identified and analyzed. The Commission was not required, as part of its consideration of the validity of the merger under Section 7 of the Natural Gas Act, to make a detailed study of the rates of the merged system of the type that would be necessary in a rate proceeding under Sections 4 and 5 of the Act. It properly held that all issues as to the specific rate

levels of the merged system were to be determined in a rate proceeding. There is no basis in the record for California's claim that the Commission refused to permit inquiry as to the effect of the merger on El Paso's rate structures.

III

None of the grounds upon which petitioner contends that it was denied a fair hearing has any substance. (1) The claim that the examiner ignored relevant evidence, which is based on his statement made in another proceeding that he found it unnecessary in this case to study all of the many documents introduced in evidence, merely reflects the fact that much of such evidence was irrelevant to the points at issue before the Commission. (2) The applicants introduced a large number of documents apparently because, in view of California's broad generalized challenges to the merger, they wished to have available all evidence necessary to refute any claim that California ultimately might press. In these circumstances, the evidence was properly introduced; in any event, California obviously could not have been prejudiced by the introduction of evidence upon which the examiner did not rely. (3) In dealing with the effect of the merger on competition, the examiner and the Commission properly relied on two other certificate proceedings to show that additional companies would soon provide natural gas to California. In doing so, the Commission did not merely take official notice of its own proceedings; the record contained extensive evidence relating to those pipeline projects.

There was nothing improper in the agency's taking official notice of its own proceedings.

IV

There is no substance to petitioner's charge that representatives of the applicants had improper *ex parte* communications with the Commission. This claim is based on testimony given before the House Legislative Oversight Committee several months after the Commission's decision in this case.

A. When the congressional hearings on which this claim is based were held, the Commission had not yet certified the record in this case to the court of appeals. Petitioner, therefore, could have asked the Commission to reconsider its action in the light of the testimony at the hearings. It did not do so. Nor did it request the court of appeals, after the record had been certified to it, to remand to the Commission for reconsideration. Instead, it presented the issue for the first time in its reply brief in the court of appeals. In these circumstances, the matter was not properly before the court below and is not properly before this Court.

B. In any event, there is no merit to the claim. The main focus of the Committee's hearings was on matters other than this case. References to this case are few, and those references show no improper conduct. Petitioner's claim that it has "doubt and suspicion" as to alleged wrongdoing by the Commission is no ground for invalidating the agency's action.

ARGUMENT

I

THE FEDERAL POWER COMMISSION COMMITTED NO ERROR OF LAW IN ACCOMMODATING ITS PROCEEDING UNDER THE NATURAL GAS ACT TO THE POLICIES AND ENFORCEMENT OF THE CLAYTON ACT

INTRODUCTION

The present case arises out of the difficulties inherent in interrelating two overlapping regulatory statutes.

Section 7 of the Clayton Act prohibits one corporation from acquiring either the stock or the assets of another corporation where the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly. If the adverse effect upon competition were shown, this prohibition, standing alone, would be plainly applicable both to El Paso's acquisition of Pacific's stock and also to its subsequent purchase of the assets; furthermore, a district court would have undoubted jurisdiction over a suit to restrain the violation. The final sentence of Section 7 provides, however, that nothing in the prohibition "shall apply to transactions duly consummated pursuant to authority given by the * * * Federal Power Commission * * *."

Section 7(c) of the Natural Gas Act forbids a pipeline company to "acquire or operate" any facilities for the transmission or sale of natural gas "unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission." The Commission is directed, after a hearing, to issue the certificate if the

applicant is able and willing to perform the proposed service in conformity with the Act and the acquisition "is or will be required by the present or future public convenience and necessity." (Sec. 7(e).) Recently the Commission has indicated that in its present view a pipeline company *may* violate the Natural Gas Act by acquiring the stock of another pipeline company without the Commission's approval, at least when the stock purchase will result in transferring control over the pipeline operations. See *infra*, p. 51. At the time El Paso acquired the stock of Pacific, however, the Commission had never claimed or sought to assert such jurisdiction. Thus, the Department of Justice began its suit to set aside the stock acquisition under an assumption, which was shared by the Commission and apparently by both El Paso and Pacific, that the Clayton Act was applicable and the district court had jurisdiction. The district court subsequently sustained this view. See Brief for the United States in Opposition, *El Paso Natural Gas Co.* v. *United States*, No. 365, Misc. October Term, 1957, pages 3, 4.

El Paso could not lawfully have acquired Pacific's physical assets without a certificate of public convenience and necessity, regardless of whether the purchase of 99.8 percent of Pacific stock was an "acquisition" of its facilities. Therefore, when El Paso determined to merge Pacific's assets with its own, it filed an application with the Commission, and problems immediately arose in relating the proceedings before the Commisison to the suit in the district court. The pipeline companies and several western States urged

the Commission to proceed with dispatch. The Antitrust Division of the Department of Justice requested it to delay.

The Commission commenced hearings on September 17, 1958, and received evidence from the proponents. The hearing was then adjourned to November 12 for cross-examination and testimony by the opponents. At this stage the Antitrust Division notified the Commission that there was a conflict between the hearings before the Commission and the dates scheduled for trial in the district court. The Commission then wrote the district judge pointing out that El Paso had filed a motion to continue the antitrust trial which would give the district court "'an opportunity to hear both parties on this question as to whether we should proceed with the merger hearing or you should proceed with the antitrust case.'" The letter went on to say that if the motion was granted the Commission would proceed with its hearings but that if the court decided to proceed with the antitrust trial, "we will continue our merger proceedings to a date which will not conflict with your Court trial." See Appendix A, *infra*, pp. 75–77. The district court then entered an order which continued the trial of the antitrust case "until the final determination by the Federal Power Commission of the applications now pending before it * * *" (R. 1177–1178). The Commission went forward and in due course it issued the certificate of public convenience and necessity. The antitrust suit is still pending, and the Department of Justice intends to prosecute

it unless adversely affected by the decision in this case.

In making a definitive determination of the interrelationships between the administration of the Natural Gas Act and Section 7 of the Clayton Act one would have to begin with the question whether the Commission in truth had jurisdiction over El Paso's acquisition of 99.8 percent of Pacific's stock, so that an application should have been filed for its approval. An affirmative answer to this question would strengthen the argument for upholding the Commission's order but we think, nevertheless, that it would be a mistake to attempt to resolve the question in this case. The Commission now has the issue under consideration in another proceeding. It has never made a ruling upon the question in the past. The question has not been threshed out in the lower courts. The present litigation, before the district court and the Commission, and upon review of the Commission's order, has been conducted upon the assumption that the Commission had no jurisdiction over the stock acquisition. We refer to the issue so that the Court may be aware of its potential, but since the Commission's order is valid even upon the assumption that stock acquisitions were beyond its jurisdiction, we submit that there is no reason to decide the broader jurisdictional question here.

Two critical issues which must be decided here are whether the filing of suit in the district court to set aside the stock acquisition as a violation of Section 7 deprived the Commission of power to hear

the application for approval of a merger of the assets; and if not, did the Commission err as a matter of law in proceeding to a decision favorable to the merger. Although these questions can hardly arise in the future if the Commission takes and is sustained in the view that transactions such as the antecedent stock acquisition require its approval, they lie at the heart of the present case. In our view the Natural Gas Act establishes a self-contained system of regulation which is neither to be elevated above or subordinated to the antitrust laws. See pp. 37–44, *infra*. Furthermore, even if the district court and the Commission might have been better advised to arrange for the suit under Section 7 to go forward so that the charges of illegality would be determined before the fruits of the alleged transaction came before the Commission for approval, this was a question for the Commission to resolve and, in deciding to go forward under the circumstances then existing, it did not err as a matter of law. See pp. 52–54, *infra*. The Commission actually reached a decision on the merits only after the district court had decided not to proceed with the civil action until the Commission rendered a decision.

The Commission's power to go forward is closely related to the question whether its issuance of a certificate of public convenience and necessity immunizes a merger against attack under Section 7 of the Clayton Act. This question could arise not only with respect to a merger of assets but also, if the Commission has jurisdiction, with respect to an acquisition

of stock. In the long run the proper relationship between the administration of the Natural Gas Act and the enforcement of the Clayton Act will depend very largely upon the answer to this question. Nevertheless, we think that it should not be decided in this proceeding to review the order of the Commission.

The Department of Justice takes the view that the Commission's approval of a merger does not grant immunity from the Clayton Act with respect to those acquisitions which require such authorization. *A fortiori* the Commission's approval of the merger of assets would not license *nunc pro tunc* a prior illegal stock acquisition, nor should it bar the district court from ordering divestiture of assets as a remedy. If this view be correct, the Commission's decision may have a serious psychological impact upon the antitrust suit against El Paso-Pacific; but it is not legally conclusive. The Commission's findings rest upon the evidence before the Commission. The only question presented to either this Court or the court of appeals is whether *upon this record* the findings of the Commission are supported by substantial evidence. In the antitrust case the evidence may differ; the court will have a different issue before it. Thus the two proceedings could have gone forward concurrently, and can now go forward consecutively, with each tribunal determining upon the evidence submitted to it those issues which the statutes commit to its determination.

The rejection of the position of the Department of Justice upon the question of immunity would not require a different result in the instant case. If the

Commission's order grants immunity, then the Commission may have exclusive primary jurisdiction; *a fortiori* its decision to proceed was proper while the district court voluntarily stayed its hand. In either event the judgment below is correct. A decision upon the effect of the certificate of public convenience and necessity should therefore be left to the antitrust suit where the question can, and no doubt will, be raised. The Commission did not purport to grant immunity; nor did the court below decide the question.

Two other questions are potentially involved in any merger of natural gas companies, although one is not pressed in the present case: (a) whether the Commission in finding that the merger was justified by the "public convenience and necessity" gave proper weight to the policies of the antitrust laws, and (b) whether its findings concerning the public interest are supported by substantial evidence. We discuss these questions below (see pages 54–60, *infra*) after treating the jurisdictional and procedural issues the resolution of which is necessary to the decision of the case.

A. THE COMMISSION HAD JURISDICTION OVER THE MERGER OF ASSETS AND DID NOT ERR AS A MATTER OF LAW IN PROCEEDING TO A DECISION UPON THE APPLICATION FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY WHILE THE SUIT WAS PENDING FOR VIOLATION OF SECTION 7 OF THE CLAYTON ACT

1. *The Natural Gas Act establishes an independent self-sufficient system of regulation which is not subordinate to the antitrust laws.*

Section 7 of the Natural Gas Act provides in relevant part:

> (c) No natural-gas company * * * shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations * * *
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> * * * * *
>
> (e) * * * a certificate shall be issued to any qualified applicant therefor, authorizing the * * * acquisition covered by the application, if it is found that the * * * proposed * * * acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. * * *

In reviewing the proposed merger of assets of El Paso and Pacific, the Commission confined itself to passing on the questions necessarily raised by the application.[11] It explicitly refrained from passing on the question whether the stock acquisition, which

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[11] An applicant for Commission authorization has been held to have "a substantive right to the Commission's approval upon compliance with the showing required by the statute." *Pacific Power & Light Co.* v. *Federal Power Commission*, 96 F. 2d 835, 838 (C.A. 9), affirmed, 307 U.S. 156; cf. *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission*, 328 U.S. 152, 162.

was the subject of the antitrust suit, constituted a violation of the Clayton Act. The Commission said (R. 1295–6):

> • • • What we are attempting to arrive at is the public convenience and necessity. In reaching our determination, we do not have authority to determine whether a given transaction is in violation of the Clayton Act, but we are required to consider the bearing of the policy of the antitrust laws on the public convenience and necessity. *City of Pittsburgh* v. *F.P.C.*, 237 F. 2d 741, 754 (CADC). With the presiding examiner, we find that any lessening of competition whether in the consumer markets or the producing fields, does not prevent our approving the merger because there are other factors which outweigh the elimination of Pacific as a competitor. In any case, it appears that any lessening of competition is not substantial.

We will consider below whether the Commission, in making its decision that the merger was required by public convenience and necessity, gave the required weight to the lessening of competition. See pp. 54–60, *infra*. Our purpose here is to show that Congress established a comprehensive system of regulation of natural gas companies by the Federal Power Commission which takes the policy of the antitrust laws into account but nowhere intimates that so paramount a value has been placed upon competition that the mere filing of a suit under the antitrust laws deprives the regulatory agency of its normal jurisdiction. On the contrary, the Natural

Gas Act contains every indication that the Commission has at least concurrent jurisdiction with the district court.

The concept of public convenience and necessity is itself one which leaves a broad discretion to the agency for whose guidance it is prescribed. The concept cannot be precisely defined. It is not a standard too indefinite for fair enforcement, *New York Central Securities Corp.* v. *United States*, 287 U.S. 12, but is "as concrete as the complicated factors for judgment in such a field of delegated authority permit." *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138. In using it, an agency makes a judgment as to the future—it is not regulating, punishing or rewarding a past act. *American Airlines* v. *Civil Aeronautics Board*, 192 F. 2d 417 (C.A. D.C.). The Commission's opinion here clearly shows that it decided that the public interest in the future development of the industry with whose regulation it is charged would be favorably affected by the merger.

When an industry is comprehensively regulated, competition, in the nature of things, cannot have full sway. The very requirement of a certificate or franchise signifies that entry is not open to all and that Congress has not deemed free competition to be synonymous with the public interest. This Court has indeed held that a regulatory commission errs if it supposes that merely because competition is feasible the grant of a license to enter the market is automatically warranted. *Federal Communications Com-*

mission v. *RCA Communications, Inc.*, 346 U.S. 86. As its opinion explained (p. 98):

> What may substantially lessen competition in those areas where competition is the main reliance for regulation of the market cannot be automatically transplanted to areas in which active regulation is entrusted to an administrative agency; for reasons we have indicated above, what competition is and should be in such areas must be read in the light of the special considerations that have influenced Congress to make specific provision for the particular industry.

And see *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 79–80; *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 223, 224; *City of Pittsburgh* v. *Federal Power Commission*, 237 F. 2d 741 (C.A. D.C.); compare *Far East Conference* v. *United States*, 342 U.S. 570.

The considerations that influenced Congress to make specific provision for the interstate wholesale gas industry are well indicated by the provisions themselves. The regulation they provide is very close. Pipelines and independent producers may charge only the published rates and tariffs, and those rates must be just and reasonable (Natural Gas Act, Section 4(a)) and not unduly discriminatory or preferential (Section 4(b)). All aspects of the rates and tariffs and all contracts affecting them or the services rendered must be filed with the Commission (Section 4(c); 18 C.F.R. (1961) §§ 154.1–155.1). Advance notice of any change must be given (Section 4(d)) and any change may be suspended for

five months; thereafter its collection may be made subject to refund pending completion of the hearing at which the burden to justify the rate is on the seller; and the Commission may fix the rate thereafter to be observed and enforced and may order refunds of excess collection made during the pendency of the proceeding (Section 4(e)). The Commission may fix reasonable rates after hearing had on its own motion or upon complaint of a State, a municipality or a gas distributing company (Section 5). It may compel service and direct extensions of facilities and may refuse to permit abandonments (Section 7 (a), (b)). It has broad control of accounting (Section 8), and depreciation (Section 9). It regulates imports and exports (Section 3). There can be no doubt that in issuing certificates of public convenience and necessity the Commission is charged with an analysis of the total situation. As this Court said in *Atlantic Refining Co.* v. *Public Service Commission*, 360 U.S. 378, at p. 391, "Section 7(e) requires the Commission to evaluate all factors bearing on the public interest."

The history of the Act confirms the conclusion that Congress purposefully adopted a comprehensive scheme of agency controls which would affect freedom of competition. Section 7(c) of the Act originally required certificates of public convenience and necessity only for "the construction or extension of any facilities for the transportation of natural gas to a market *in which natural gas is already being served by another natural-gas company*" (emphasis added).

52 Stat. 825. Thus the Commission's supervision was deemed necessary to control competition, and it was only at the time of the 1942 amendments that certificates were required with respect to monopoly situations as well. 56 Stat. 83. The original Section 7(c) was patterned after similar provisions of the Interstate Commerce Act, 49 U.S.C. 1 (18)–(20), the Communications Act of 1934, 47 U.S.C. 214, and the Motor Carriers Act, 49 U.S.C. 306–307. H. Rept. No. 709, 75th Cong., 1st Sess., p. 6.

The record of the hearings makes it evident that the Congress knew that it was entrusting the Commission with a measure of responsibility for deciding whether a monopoly might be required by the public convenience and necessity. See, *e.g.*, the comment of Representative Lea, Chairman of the House Committee on Interstate and Foreign Commerce, with reference to the provision of Section 7(c) relating to certificates of public convenience and necessity:[13]

> THE CHAIRMAN. I think anyone looking over the history of regulation in recent years could not help but reach the conclusion that the decided weight of opinion is, for modern regulation, in favor of a certificate of convenience and necessity. The only justification for regulating these utilities is that they do have what is in effect, a monopoly. In the absence of that monopoly it might be better to have no regulation so we could depend upon competition taking care of the needs of the consumer.

[13] Hearings, House Comm. on Interstate and Foreign Commerce, 75th Cong., 1st Sess., March 24 and 25, 1937, p. 82.

> We must eventually reach a conclusion one way or another, whether we trust the Commission. If we can trust the Commission, with the important duty of fixing our rates, why can we not trust them with the question of two lines or one?

The Congressional debates also show a recognition that the Commission would be expected to decide in particular cases upon the extent to which competition would be consistent with the public convenience and necessity. See the remarks of Representatives Lea and Halleck at 81 Cong. Rec. 6723, those of Representative Cole at 81 Cong. Rec. 6724. Both Messrs. Halleck and Cole were members of the committee.

In sum, we find nothing in the Natural Gas Act to suggest that the regulatory powers of the Commission are superseded by the filing of an action for violation of Section 7 of the Clayton Act or other laws intended to preserve competition. All the inferences to be drawn from that statute point to the conclusion that the authority of the Commission is plenary.

2. ***The action of the Federal Power Commission did not foreclose prosecution of the suit for violation of Section 7 of the Clayton Act.***

The final sentence of Section 7 of the Clayton Act provides:

> Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Com-

> mission, the Securities and Exchange Commission * * *, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary or Board.

A priori there are two possible interpretations of this provision. Under one view, which is urged by El Paso (Br. 230–244), the provision immunizes from attack under Section 7 any merger which has been approved by one of the agencies listed, including the Federal Power Commission when it issues a certificate of public convenience and necessity under the Natural Gas Act, Section 7. Under the other view, which represents the position of the Department of Justice, no immunity is granted unless the regulatory statute specifically authorizes the agency to grant immunity; and no such authority is granted the Commission under the Natural Gas Act. The Commission did not purport to rule upon this question. We submit that its restraint was wise. The decision should be left to the antitrust suit where the issue can be decided if the defense is raised. It should not be resolved in the present case because under either view the decision below is correct.

(*a*) Under the first alternative there would be strong ground for arguing that the Commission had an exclusive primary jurisdiction requiring the court to defer to the Commission, rather than the Commission to the court. If the Commission's decision came first, and granted immunity, the merged companies would have a complete defense. An earlier judicial

decision which bound the parties regardless of the Commission's subsequent determination would prevent an effective decision by the body to which Congress delegated the responsibility. A judicial decision subject to reversal by the agency could cause only confusion. Cf. *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 439–441; *United States* v. *Morgan*, 307 U.S. 183, 191–194.

(*b*) When El Paso instituted the proceeding before the Commission for approval of the merger of the assets, it also filed a motion in the district court seeking dismissal of the antitrust complaint upon the ground that the case interfered with the Commission's primary jurisdiction. The district court denied the motion from the bench upon the ground that the issues in the Clayton Act proceeding (involving the stock acquisitions) were not the same as those before the Commission (involving the merger of assets). Under the Natural Gas Act, the district court held, the Commission had no jurisdiction to decide whether the stock acquisitions violated the Clayton Act, or to grant immunity to such acquisitions.[14] The court pointed out that although the pipeline companies initially could have sought Commission approval of the merger of their assets and might thereby have obtained immunity, they "didn't choose to proceed that way" but instead took "a calculated risk" by acquiring the stock. Assuming that the case is to be decided upon the assumption that the Commission had no jurisdiction over El Paso's purchase of Pacific's stock, either because the Act grants none or because its jurisdiction was not invoked, this analysis seems

[14] But see pp. 34–37, *supra*.

plainly correct. The Commission's approval of the merger of the assets therefore left unaffected the judicial power to rule upon the validity of the stock acquisition.

The Department of Justice is also of the opinion that the Commission's action could not bar the prosecution of the antitrust suit for the broader and more fundamental reason that the issuance of a certificate of public convenience and necessity for the acquisition of either stock or assets does not immunize the transaction against civil proceedings for violation of Section 7.[15] The critical sentence lists a number of agencies which have no statutory authority to immunize transactions from the antitrust laws and some which do. Apparently all were listed with the purpose of preserving their existing authority whatever its scope might be. See Hearings before Subcommittee No. 2 of the House Committee on the Judiciary, 80th Cong., 1st Sess., pp. 241, 258; H. Rept. No. 1191, 81st Cong., 1st Sess., p. 6. The Maritime Commission, for example, had never asserted authority to immunize mergers. When its name was added to the list at its request, the Senate Committee reported that "it is not intended that the Maritime Commission,

[15] In its decision the Commission did not rule on this question. It has doubts, however, as to the wisdom of reading the regulatory statute and the antitrust laws to require that a single transaction be examined in two forums which apply different standards. See R. 1295. Since considerations supporting this view are elaborated in the El Paso brief and since the point need not in any event be decided in this litigation, it suffices to note that the Commission does not endorse the Department's argument concerning the immunity provision in Section 7.

or, for that matter, any other agency included in this category, shall be granted any authority or powers which it does not already possess." S. Rept. 1775, 81st Cong., 2d Sess., p. 7.

The Federal Power Commission does not possess authority to grant immunity from the antitrust laws. Unlike some other regulatory statutes which provide antitrust immunity for transactions approved by the agency charged with their administration (*e.g.*, Section 15, Shipping Act, 1916, 39 Stat. 728, 733; 46 U.S.C. 814) the only specific reference to the antitrust laws in the Natural Gas Act is a provision in Section 20(a) (15 U.S.C. 717s) authorizing the Commission to "transmit * * * evidence * * * concerning apparent violations of the Federal antitrust laws to the Attorney General * * *." In short, the Natural Gas Act contemplates that the antitrust laws will remain in full force in their application to the natural gas industry. Cf. *United States* v. *Borden Co.*, 308 U.S. 188, 201.

Immunity from the antitrust laws will not be lightly implied, but depends upon express statutory authorization. In every case where Congress has provided that an agency-approved transaction shall be exempt, it has made the provision expressly applicable to all of the antitrust laws and not merely with respect to one of many overlapping sections. Thus, it seems highly unlikely that Congress would have provided that the acquisition of pipeline assets should be exempt from Section 7 of the Clayton Act while remaining subject to Sections 1 and 2 of the Sherman Act. Yet even under El Paso's interpretation of the final

paragraph of Section 7, the liability of the El Paso-Pacific merger to challenge under the Sherman Act cannot be questioned.

Although there are no decisions precisely in point, this interpretation is the more consistent with *Maryland and Virginia Milk Producers Association* v. *United States,* 362 U.S. 458, and *United States* v. *Radio Corporation of America,* 358 U.S. 334.

(*c*) Assuming the legality of the stock acquisition was within the jurisdiction of the district court when the antitrust suit was filed, that court, we believe, still has full jurisdiction to determine the legality of the stock acquisition and, if it finds it illegal, to grant appropriate relief. The Commission did not purport to pass upon the legality of the stock acquisition; no action which it has taken makes that issue *res judicata.* Nor did it undertake to pass upon the antitrust charges as such. It determined rather that in its judgment a merger of the assets of El Paso and Pacific Northwest was required by the public convenience and necessity. This determination was made under Sections 7(c) and 7(e) of the Natural Gas Act, the latter of which directs the Commission, when it makes such a determination, to issue a certificate. If it should be determined in the antitrust suit (1) that the district court has jurisdiction over the stock acquisition, (2) that this acquisition was illegal, and (3) that effective relief requires that the *status quo ante* be restored,[16] the Commission, we submit, would be

[16] On October 31, 1960, the United States filed in the antitrust suit a motion to amend its complaint. The charging portion of the complaint would be amended to allege that "The

bound to honor that determination and to undertake such administrative measures as might be required to implement the decree."

To be sure, it may be suggested that the stock acquisition and the assets merger can be regarded as integrated steps in what is essentially a single transaction, and that this entire transaction is within the special competence of the Federal Power Commission. See the views expressed by Judge Prettyman, speaking for the court below. R. 1444–1445. It might also be argued more broadly that the Power Commis-

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acquisition by El Paso of the stock of Pacific Northwest *and the merger of Pacific Northwest into El Paso* are in violation of Section 7 of the Clayton Act in that the effect of El Paso's acquisition of Pacific Northwest's stock *and assets* may be to substantially lessen competition or tend to create a monopoly" (significant changes in language in italics). The prayer for relief would be amended to request that El Paso be required to divest itself not only of the stock of, but also of the "assets formerly owned or controlled by, Pacific Northwest."

[17] We recognize that it was held in *Arrow-Hart & Hegeman Electric Co.* v. *Federal Trade Commission*, 291 U.S. 587, that the Trade Commission's power to grant relief under Section 7 of the Clayton Act was frustrated when a merger of assets and a corporate reorganization took place prior to the date that the agency issued its final order directed to an antecedent stock acquisition. We believe, however, that this decision is no longer viable and that this Court's numerous subsequent holdings as to the breadth of equity's power to grant effective relief in antitrust proceedings would compel the Court to adopt the view stated in the dissenting opinion of Mr. Justice Stone (in which Chief Justice Hughes and Justices Brandeis and Cardozo joined). He stated (291 U.S. at 608): "There is as much reason to believe that Congress did not intend to deny to the Commission the authority to exercise effectively the granted power, and thus to preserve its jurisdiction until its function could be executed, as there would be were similar powers extended to a court of inferior jurisdiction."

sion's jurisdiction to pass upon the acquisition and operation of jurisdictional facilities (Natural Gas Act, Section 7(c)) may extend to an acquisition of beneficial ownership through stock control as well as to an acquisition of legal ownership by a direct transfer of assets (albeit the Commission did not, in this proceeding, assert any jurisdiction over the initial stock acquisition).[18] Either of these views, if accepted, would have bearing upon the pending antitrust suit.

There is, in other words, inherent in the district court case a possible question as to whether the doctrine of primary jurisdiction applies, *i.e.*, whether an acquisition of the stock of a natural gas pipeline is a matter for court or for agency. Cf. *Far East Conference* v. *United States*, 342 U.S. 570, 574–575. But to the extent that this question is involved in the district court case it is presented not because the Commission has entered the order which is now under review, but only because it would in all events be necessary to examine and reconcile the revelant provisions of the antitrust laws and the Natural Gas Act. The same question would be presented in the district court if the Commission had deferred its proceedings entirely. For present purposes, it suffices to say that

[18] In a recent action, dated December 13, 1961, the Federal Power Commission has undertaken to ascertain whether it has jurisdiction over a proposed acquisition of stock control of a natural gas pipeline company by Humble Oil. Copies of the show cause order entered in that proceeding and of the accompanying press release are reprinted in Appendix B, *infra*, pp. 78–82.

the issue of the district court's jurisdiction over the stock acquisition remains open for decision in that case.

3. *The Commission did not commit reversible error in proceeding to a decision approving the application without awaiting a decision in the antitrust case.*

The foregoing considerations amply demonstrate that the Commission did not lose jurisdiction to approve the merger of assets merely by reason of the filing of a suit to enjoin violation of Section 7 of the Clayton Act. The possession of authority does not compel its exercise, and strong arguments could undoubtedly be presented for obtaining a decision upon the legality of the stock acquisition before inquiring into whether the merger of assets, which was its fruit, would be in the public interest. Thus the Commission was required to consider whether it should go forward or, as a matter of comity and sound administration, should stay its hand until the district court had rendered a decision. The answer to such a question, however, lies within the agency's discretion. Under the peculiar circumstances of this case the decision to go forward was not an abuse of discretion constituting an error of law.

It is enough to mention two circumstances. When the Commission scheduled hearings it knew that its staff had evidence that Pacific was in poor financial condition and delay might have untoward consequences. When the Commission found that there was a conflict between the date upon which its hearings were to be resumed before the trial examiner and the dates which the district court had scheduled for trial

of the antitrust case, the Commission wrote to the district judge pointing out that although the Antitrust Division had declined to become a party to the proceedings before the Commission, El Paso had filed a motion in the district court to continue the antitrust case which would give the district court "an opportunity to hear both parties on this question as to whether we should proceed with the merger hearing or you should proceed with the anti-trust case." The letter went on to say that if the motion was granted the Commission would proceed with its hearings but that if the court decided to proceed with the antitrust trial, "we will continue our merger proceedings to a date which will not conflict with your Court trial." See Appendix A, *infra*, pp. 75–77. The court then continued the trial of the antitrust case "until the final determination by the Federal Power Commission of the applications now pending before it * * *" (R. 1178).

It was only after the district court had made its decision to withhold action pending the Commission's determination, that the Commission completed the hearings and rendered a decision. The mere taking of evidence could not prejudice the trial of the antitrust suit. To have postponed the resumption of the Commission's hearings or the handing down of its decision in the face of the district court's action would have created unnecessary delay if not an impasse in which each tribunal did nothing awaiting the decision of the other. Cf. *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission*, 328 U.S. 152, 161–162. If petitioner believed that the district court was required to go first as a matter

of law, and was therefore unlawfully refusing to exercise its jurisdiction, it should have proceeded by mandamus. However, petitioner took no such action and therefore should not be heard to complain of the course which the Commission adopted with knowledge of the decision of the district court.

B. THE COMMISSION GAVE PROPER WEIGHT TO THE PUBLIC INTEREST IN COMPETITION IN DETERMINING THAT THE MERGER OF ASSETS WAS JUSTIFIED BY THE PUBLIC CONVENIENCE AND NECESSITY. UPON THE RECORD BEFORE IT THE COMMISSION'S FINDINGS ARE SUPPORTED BY SUBSTANTIAL EVIDENCE

1. *Proper standards were applied by the Commission in evaluating the effect of the merger upon the public convenience and necessity.*

In determining whether the proposed merger should be authorized the Commission considered "the bearing of the policy of the antitrust laws on the public convenience and necessity" (R. 1296). Upon a careful examination of the report of the trial examiner and its own study of the effect of the merger upon competition,[46] the Commission found (*ibid.*)—

> * * * any lessening of competition whether in the consumer markets or the producing fields, does not prevent our approving the merger because there are other factors which outweigh the elimination of Pacific as a competitor. In any case, it appears that any lessening of competition is not substantial.

[46] In appraising the effect of "the elimination of Pacific as a competitor" (R. 1296), the Commission compared the competitive situation after the asset merger with that which would have existed in the absence of any stock relationship. As the Commission noted (R. 1184, 1299), El Paso stated that the stock relationship would be terminated if the asset merger were not consummated (R. 36, 98–100, 361–368, 379, 482, 490–491).

The Commission's approach to the antitrust issues is supported by *United States* v. *Radio Corporation of America*, 358 U.S. 334. In that case this Court held that the action of the Federal Communications Commission in approving an agreement for an exchange of two television stations did not bar a subsequent antitrust suit which alleged that the exchange agreement was entered into pursuant to an illegal conspiracy, and was itself illegal because in unreasonable restraint of trade. The Court ruled (p. 346; see p. 343) that "the Commission was not given the power to decide antitrust issues as such"; it further stated (p. 351, footnote omitted), however, that it was not implying "that federal antitrust policy may not be considered in determining whether the 'public interest, convenience, and necessity' will be served by proposed action by a broadcaster, for this Court has held the contrary. *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 222–224."

Similarly, in the present case, a conclusion that the Power Commission has no authority to determine antitrust violations as such (a conclusion with which we fully agree)[*] does not lead to the conclusion that the Commission erred in considering the question of antitrust policy to which it addressed itself, *i.e.*, the

[*] Section 20(a) of the Natural Gas Act, upon which petitioner relies (Br. 30, 35), provides that the Commission may request the Attorney General to institute injunctive or criminal proceedings for violation of the Gas Act or of the antitrust laws. It does not bear, however, upon the question whether the Commission is to consider antitrust policies in exercising the functions committed to it.

effect of the merger upon competition in the regulated industry. On the contrary, the Power Commission, like the Communications Commission in comparable situations, properly may—and, indeed, must—consider antitrust policy as part of its broader determination whether the merger was required by the public convenience and necessity.

2. *The Commission's finding that the merger of assets is required by the public convenience and necessity is supported by substantial evidence.*

The Commission's ultimate conclusion that the merger of El Paso and Pacific is required by the public convenience and necessity is supported by extensive detailed findings that elaborate the potential effect of the combination upon competition. California does not challenge the sufficiency of the underlying evidence that supports those findings. Its attack on their adequacy is fundamentally only a quarrel with the Commission as to the appropriate inferences to be drawn from the findings. That question, however, is a matter which Congress has committed to the informed discretion of the Commission as an essential step in determining whether a proposed merger is in the public interest.

As pointed out in the Statement (see *supra*, pp. 15–19), both the examiner (R. 1185–1195) and the Commission in its opinion (R. 1295–1297) carefully considered the effect of the merger on competition. The examiner pointed out (R. 1185) that the competitive effects of the merger were significant in two respects: "the market areas supplied with natural gas

by El Paso and Pacific," and "the producing areas which are economically accessible by pipeline to these companies, for the acquisition of natural gas supplies for transportation and sale in their markets." With respect to competition in the sale of gas, the findings show (R. 1159–1168) that the two companies were certificated to serve, and have served, different markets—El Paso has supplied natural gas primarily to the State of California, and Pacific to the Pacific Northwest—and that Pacific never sold gas in California.

The examiner found (R. 1185–1186) that, prior to the merger, the only market in which there had been actual or potential competition for the sale of gas between the two companies was the State of California; and that Pacific, because of its financial weakness, was never "a real competitor" for this market. He noted (R. 1186) the unsuccessful attempts by Pacific to develop sufficient customer commitments within the State to enable it to finance the construction of a pipeline. (The evidence in the record dealing with these unsuccessful efforts by Pacific is set forth in footnote 8, *supra*, p. 17). The examiner also pointed out (R. 1187–1188) that two additional pipeline companies would shortly bring natural gas to California, and he concluded (R. 1192) that these two companies "will offer considerably greater and stronger competition to El Paso than Pacific could possibly have offered as a separate corporation * * *."

In considering the effect of the merger on competition in the acquisition of natural gas, the examiner

stated (R. 1194) that Pacific would be eliminated as a competitor in purchasing gas in the San Juan Basin, the Aneth Field, fields in the Rocky Mountain area, and from Canada, but that Pacific could not compete strongly with El Paso for gas in the Permian Basin or the Panhandle-Hugoton Field. The examiner concluded (R. 1195), however, that the elimination of Pacific as a competitor in those producing fields "is not of great consequence" since "there remain other strong competitors for gas in all producing fields to which the unified company will have access."

In upholding the examiner's conclusion that "any lessening of competition whether in the consumer markets or the producing fields * * * is not substantial" (R. 1296), the Commission noted (R. 1296-1297) that Pacific, "because of its initial financial difficulties did not threaten immediate or substantial competition" with El Paso in the California market; that, "irrespective of the merger, there is additional competition in prospect" from two other companies (competition which has since become a reality); and that, in those areas of supply where Pacific would be a competitor of El Paso in purchasing gas, other purchasers remained.

Moreover, in view of the substantial benefits which the Commission found the merger would produce—improved gas supply and utilization of gas reserves, a financially stronger gas supplier, expanded and improved gas service, and lower rates (see the Statement, *supra*, pp. 20-24)—the Commission was justified in concluding that, upon weighing such benefits

against any injury to competition, the public convenience and necessity lay on the side of the merger. Cf. *McLean Trucking Co.* v. *United States*, 321 U.S. 67, where the Court, in discussing the similar "problem of accommodation of the Transportation Act and the anti-trust legislation" (p. 79) faced by the Interstate Commerce Commission in passing on applications for the consolidation of motor carriers, pointed out (p. 87) that—

> * * * the Commission must estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation and consider them along with the advantages of improved service, safer operation, lower costs, etc., to determine whether the consolidation will assist in effectuating the over-all transportation policy. * * *

The same reasoning, we submit, justified the Commission in concluding that any adverse effect resulting from "curtailment of competition" was outweighed by the "advantages of improved service" and other benefits which would result from the merger, and that the merger was therefore in the public interest.

In sum, the Commission considered the merger in its broadest aspects—the competitive factors, the matter of improved service to the public, the question of conservation, the probable effect on rates, the growing needs of the market. Cf. *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 85–88. In deciding the question before it—the desirability of the merger from the standpoint of the public convenience and necessity—it did not act improperly and it reached

a judgment which was both reasonable and informed. That judgment, of course, was necessarily based on the record before it, and did not purport to apply the standards of Section 7 of the Clayton Act. The fact that on this record the Commission concluded (R. 1206) that "any lessening of competition [which may result from the merger] is not substantial" in no way indicates, or even suggests, that the district court, on the different record to be made in the antitrust suit, should or would reach the same conclusion.

II

THE COMMISSION GAVE PROPER CONSIDERATION TO THE EFFECT OF THE MERGER UPON THE RATES OF THE MERGED SYSTEM

1. As shown in the Statement (*supra*, pp. 23–24), both the examiner and the Commission gave careful consideration to, but rejected, petitioner's claim that the effect of the merger would be to increase rates within the State of California. The examiner found (R. 1222–1228), as one of the grounds for approving the merger as in the public interest, that it would result in lower rates. The Commission, noting the concern that the higher costs of gas originating on the Pacific system "will be imposed on El Paso's customers in California * * * agree[d] with the presiding examiner that * * * the merger will result in savings that will tend to lower rates or prevent them rising more than they would otherwise" (R. 1303).

The record supports the conclusion that the merger will result in savings tending to produce lower rates. It will lower administrative costs by eliminating

duplication of services (R. 44, 70–73); it will lower financing costs by giving the merged company gas reserves having a longer life than those of El Paso alone (R. 31); it will lower gathering costs through simplification of gathering systems (R. 17, 74–75); it will lower unit costs of transportation by permitting the Pacific system to operate at a higher load factor (R. 38–39, 50); and it will lower production costs by the addition of Pacific's dry gas reserves (R. 27–32). If so far as the effect of the merger on the California customers of El Paso is concerned, the president of El Paso testified (R. 43) that "it will not be our policy, that the customers of El Paso, as El Paso is now constituted, should be burdened with the cost that may be necessary to serve the present customers of Pacific Northwest."

In approving the merger, the Commission required El Paso to maintain its accounts so that, in any future rate proceeding, the costs arising on the Pacific segment of the merged system could be readily identified and analyzed. Paragraph H of the Commission's order (R. 1308–1309) requires the merged system to keep separate accounts not only for the El Paso and Pacific systems, but also for specified portions of the latter system.

2. The Commission was fully justified in refusing, as part of its consideration of the validity of the merger under Section 7 of the Natural Gas Act, to make the same kind of detailed study of the rates of the merged system as would be necessary in a rate proceeding under Sections 4 and 5. As the Commission

pointed out (R. 1303), "the merger will not of itself result in any rate change," since El Paso proposed no changes in any rates then on file by it or Pacific and, indeed, gave assurance that no new rate increases for Pacific's customers would be filed with the Commission for at least one year. "Thus any effect which the merger may have on rates is not before us at this time. It will necessarily have to be settled in another proceeding" (R. 1303). Cf. *Atlantic Refining Co.* v. *Public Service Commission*, 360 U.S. 378, 390–391, where the Court pointed out that a just and reasonable rate hearing is not a prerequisite to the issuance of producer certificates.

To the extent that the higher cost facilities of Pacific are used to serve, and hence to provide benefits for, El Paso's customers in California, it is only proper that such customers bear their fair share of such higher costs.[126] The Commission stated (R. 1304), however, that "[t]his issue of allocation, of course, is one for a rate proceeding. It is a matter for our judgment based upon all the facts before us concerning the operation of the merged system." And, as noted, the Commission took care to insure that the cost accounts of the merged system would be maintained so as to facilitate such cost allocation in future rate proceedings.

The court of appeals fully answered petitioner's contentions on this issue when it stated (R. 1439–1441):

> * * * Increases in rates must under the scheme of the statute be proposed by the utility

[126] The higher cost of Pacific's gas, if delivered competitively to California, has been noted. See note 8, pp. 17–18, *supra*.

company. The Commission, then, under either Section 4(e) or Section 5(a) of the statute, can determine the lawfulness of the proposals. * * * Schedules of rates are complicated affairs, involving classifications of customers and services, with underlying considerations of allocable costs. In the absence of any proposals for increases, a rate inquiry as to possible future requests would be entirely speculative. The Examiner correctly said, we think, that the "dollar impact" of the merger would have to await a rate inquiry. * * *

* * * [A]n inquiry into specific future rates was not required. Inquiry into the effects of the merger upon future costs, and thus perhaps ultimately upon future rates, was one of the factors to be weighed in evaluating the public interest in the merger. The Commission made such an evaluation, and we think it is sufficiently supported. * * * [20]

3. California alleges (Br. 40; see Br. 41, 46) that the Commission refused "to permit specific inquiry as to the effect of the proposed merger upon El Paso's rate structures." This contention, not raised before the Commission and therefore not open to California here (see *infra*, p. 65), is without substance. For there is nothing in the record indicating that Cali-

[20] Nothing in the legislative history cited by petitioner (Br. 42-43) requires a contrary conclusion. That history indicates that one of the purposes of certain 1942 amendments to the Natural Gas Act was to authorize the Commission, in passing on certificate applications, to study the "characteristics of the rate structure" of the companies involved. As shown in the text, the Commission fully considered the rate structure of the merged system, and concluded that the merger would result not in higher rates for the California customers of El Paso, but in lower rates for the entire system.

fornia ever attempted to present or develop evidence on this issue, or that the Commission foreclosed it from doing so. California cites nothing to support this claim in its main brief, and its citations in the petition afford no basis for the contention.[21] Indeed, as we have shown (*supra*, pp. 23–24), the record contains substantial evidence relating to cost savings that the merger would produce, and both the examiner and the Commission concluded that such savings would tend to produce lower costs. To the extent that this contention is but another way of arguing that the Commission should have conducted a full-dress rate proceeding in the merger case, it has, as we have already pointed out, no merit whatever.

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[21] In its petition (p. 21), California cited pages 385–387 and 443 of the record for its claim that it was denied the right to cross-examine on the rate issue. Neither citation supports the claim. Pages 385 to 387 contain testimony of Mr. Kayser, the president of El Paso. He answered every question put to him by Mr. Bennett, counsel for California; the examiner did not sustain any objections to Mr. Bennett's questions; and Mr. Bennett did not object to any of Mr. Kayser's answers as unresponsive. Page 443 contains only a colloquy among the examiner and counsel, in which Mr. Bennett did not participate. During the colloquy, the examiner stated that "unless I am directed to do so by order of the Commission, I am not going to make a rate case out of this—whether they are lawful under Section 4(a) or 4(b), whatever it is, of the Act. I am not going to do it unless directed to do it." As shown in the text, the examiner correctly stated the scope of the proceeding before him.

III

PETITIONER WAS NOT DENIED A FAIR HEARING

Petitioner contends (Br. 49–56) that it was denied a fair hearing in three respects: (1) The examiner failed to consider relevant evidence; (2) irrelevant documentary evidence was erroneously introduced; (3) the Commission improperly took official notice of two other certification proceedings.[22] The second and third contentions are not open to California here, since they were not properly raised before the Commission.[23] In any event, all of them are without substance.

[22] Petitioner also contends (Br. 57–60) that the Commission's decision was deficient in "basic findings." As shown in the Statement, *supra*, the examiner's lengthy decision, as supplemented by the Commission's own opinion, discusses in detail all pertinent aspects of the merger. Petitioner does not challenge the sufficiency of the underlying evidence that supports those findings, and, as we have pointed out, the findings are plainly adequate to support the Commission's ultimate conclusion that the merger is required by the public convenience and necessity.

[23] Petitioner made no objection to the introduction of the allegedly irrelevant evidence, did not raise the issue in its petition for rehearing, and has shown no reasonable ground for its failure to do so. As to this issue, therefore, judicial review is plainly foreclosed by Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b). *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 364 U.S. 137, 156–158; *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 497–501; *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 324 U.S. 635, 649, 650–651.

Although petitioner did object in its petition for rehearing to the Commission's findings as to the two other proceedings, this objection came too late. For under Rule 1.31(c) of the Commission's Rules of Practice (18 C.F.R. 1.31(c)), matters not included in exceptions to the examiner's decision are deemed

1. *The examiner did not fail to consider relevant evidence.*—The claim that the examiner ignored relevant evidence is based on the statement he made during the hearing in another case that he had "just got through writing a decision back in November in the El Paso merger case," and that (Br. 25):

> I assure you, gentlemen, that when I searched the record for the things that were dispositive of the issue, I didn't examine carefully 15 of those 500 documents. There was no occasion to. There was absolutely no occasion to examine as many as 15 of those 500—maybe it was 25.
>
> Now, that is what I am talking about, all this unnecessary work that must be done, all this unnecessary overdoing of the case that must be done before we ever determine what the issues are.

The argument rests upon a careless reading of the examiner's statement. He did not say that he ignored any evidence; on the contrary, he said that he "searched the record for the things that were dispositive of the issue." In studying the whole record, *i.e.*, all the evidence pressed upon him by counsel which seemed sufficiently relevant to be admitted at the hearing, he found that no more than fifteen documents were really dispositive of the issue. It was these dispositive documents that required study in detail.

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waived. Since petitioner's exceptions (R. 1277–1289) did not raise this issue, it is not open on judicial review. *State of Wisconsin* v. *Federal Power Commission*, 201 F. 2d 183, 186–187 (C.A. D.C.), certiorari denied, 345 U.S. 994; see *United States* v. *Tucker Truck Lines*, 344 U.S. 33, 37; R. 1356.

Every judicial officer or attorney preparing an argument upon appeal knows that litigation frequently develops in this fashion. The examiner was merely protesting against the tendency of careful and zealous counsel to introduce voluminous documents having only a peripheral bearing upon the issues which finally emerge when a case is carefully analyzed.

Most of the evidence upon which the examiner based his decision was testimonial, not documentary. The three exhibits which California now suggests (Br. 51–52) may have been ignored (Nos. 420, 421, and 423, R. 1031–1034, 1039–1048) were designed to indicate, on the basis of certain cost allocation figures, the probable effect of the merger on future rates. As we have already shown (see Point II, *supra*), however, the Commission adequately considered the effect of the merger on future rates, and concluded that it probably would lower them; the issue of the specific level of future rates was properly left for future rate proceedings.

2. *There was no improper introduction of evidence.*—Although the examiner ultimately found it unnecessary to consider many of the documents introduced, that fact did not render their admission into evidence improper. There were 429 exhibits admitted, approximately 350 of which were gas purchase contracts, service agreements, contracts with industrial customers, and geological reports. Many of these were apparently introduced because, in view of the generalized character of California's objection to

the merger,[24] the applicants submitted everything that might be pertinent in refuting any specific objections that California later might make. Although it might have been better practice to have made more effort to sharpen the issues in advance, under these circumstances the admission of the voluminous documents was fully justified.

But even if their admission were erroneous, the ruling could not possibly have prejudiced the petitioner.

3. *The Commission properly considered two other certification proceedings.*—In dealing with the effect of the merger on competition, both the examiner and the Commission (in its own opinion of December 23, 1959) relied on two other certification proceedings to show that additional companies would soon provide natural gas to California. The first of these companies had been certificated on August 10, 1959,[25] and the second was certificated on August 5, 1960;[26] both

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[24] Thus, at the opening of the hearing counsel for California, after stating (R. 6–7) that California opposed the merger because it "has no wish to be made solely dependent for a commodity so vital as this upon a single supplier," and that the merger "is contrary to the interest of the West, and particularly to the interest of the State of California," concluded (R. 7–8):

> * * * [L]et me say without qualification that I am certain that no matter what is developed here by the corporate applicants, our position will not be changed in the leastwise. We have definite notions about this merger. We are representing 12 million people here, and we think for our people in California that this thing is not good, it is not healthy, and we reject it, and we ask the Commission reject it.

[25] *Transwestern Pipeline Co.*, 22 F.P.C. 391.

[26] *Pacific Gas Transmission Co.*, 24 F.P.C. 134.

are now operating pipelines that are bringing natural gas to California.

Although petitioner complains (Br. 55–56) that the Commission took official notice of those proceedings, the fact is, as the Commission pointed out in denying rehearing (R. 1356), that both of the applications "were described at some length in the testimony and other evidence in the present proceeding," and it was not therefore "necessary for us to take official notice of these proceedings." El Paso and Pacific introduced evidence with respect to those two projects, which showed their location and their expected impact on the California market. R. 11, 46–47, 129–134, 141–142, 146–149, 174–175, 200–205, 270, 564, 700–708, 714–723. In any event, an administrative agency may take official notice of its own proceedings where, as here, no prejudice results and the litigant has the opportunity to offer evidence on the subject. *United States* v. *Pierce Auto Lines*, 327 U.S. 515, 530; *American Trucking Associations* v. *Frisco Transportation Co.*, 358 U.S. 133, 144.

IV

PETITIONER'S CHARGES OF IMPROPER EX PARTE CONTACTS BETWEEN REPRESENTATIVES OF THE APPLICANTS AND THE COMMISSION ARE WITHOUT SUBSTANCE

Petitioner, relying on testimony given before the House Legislative Oversight Committee several months after the Commission's decision in this case (Br. 26), alleges that the hearings "revealed to petitioner that frequent ex parte contacts had been made with members of the Commission by representatives

of the applicants" (Br. 62), and that petitioner "is confronted with legitimate bases for doubt and suspicion" (Br. 66). As we show below, this claim was not properly raised before the court below and is not properly before this Court; in any event, it has no substance.

A. The Congressional hearings on which this claim is based were held from May 10 through May 24, 1960. At that time the record in this case had not been certified by the Commission and the jurisdiction of the court of appeals had not yet become exclusive. If California felt that testimony at the hearings warranted the disqualification of any Commissioner, the proper course would have been to ask the Commission to reconsider its action in the light of these disclosures. *Neisloss* v. *Bush*, 293 F. 2d 873 (C.A.D.C.). That course was not taken.

On June 13, 1960, the record was filed in the court of appeals, and the jurisdiction of that court to "affirm, modify, or set aside" the order complained of became exclusive (Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b)). It would then have been appropriate for petitioner to make a motion to the court, as provided in Section 19(b) of the Gas Act, 15 U.S.C. 717r(b), to remand because of disclosures in the Congressional proceedings, or perhaps to modify the petition for review of the Commission's order. California did not follow either of those courses, but instead presented the issue for the first time in its reply brief filed in December 1960 in the court of appeals. In these circumstances, the matter was not

properly before the court below and is not properly before this Court.

B. There is no semblance of merit to petitioner's complaint. The transcript of the Congressional hearings as well as the staff report and the committee report all show that the main focus of the committee's hearings was on matters other than this case. References to this case are few, and those references show no improper conduct."

California states (Br. 26, 62) that the expedition of matters before the Commission was mentioned *ex parte*, and also that "the merits of pending cases may have been discussed." Its references are primarily to the testimony of Commissioner Kline, relating to Mr. Wimberly, a former Commissioner and a social acquaintance of Commissioner Kline, who did visit the Commissioner at his office occasionally. But Mr. Kline specifically stated that Mr. Wimberly did not discuss the present case with him."

" El Paso submitted to the court below a printed pamphlet setting forth all the portions of the hearings to which California referred below (and to which it refers in its petition to this Court). A copy of that document ("Résumé of Relevant Matters and Extracts from Transcript of Hearings Before a Special Subcommittee on Legislative Oversight of the Committee on Interstate and Foreign Commerce, House of Representatives, 86th Cong., 2d Sess., May 10, 11, 12, 13, 16, 17, 18, 19, 20, 23 and 24, 1960") has been lodged with the Clerk and is reprinted at R. 1367–1418. The record also contains (R. 1418–1433) a memorandum containing excerpts from the hearings which California submitted to the court of appeals.

" See R. 1371:

Mr. Lishman [Counsel for the Subcommittee]. Well, during this time weren't active merger negotiations going

The fact is that (as shown in the excerpts from the hearing reprinted in the record, see note 27, *supra*) there is nothing in the transcript of the Congressional hearings which shows that *this case* was ever discussed by representatives of the applicants with any commissioner, either during its pendency before the Commission or at any other time. On the contrary, the commissioners who testified at the hearings affirmatively denied any *ex parte* discussion of this case (Commissmissioner Kline, R. 1371, 1375–1376, 1381; Commissioner Connole, R. 1382; Commissioner Stueck, R. 1403, 1405). Petitioner virtually concedes this by its statement that it has "legitimate bases for doubt and suspicion." But a litigant's "doubt and suspicion" as to alleged wrongdoing by an administrative agency, without any factual support therefor, is no ground for invalidating the agency's action. This is particularly so here, where California had ample opportunity, after the alleged disclosures were made before the Subcommittee, either to ask the Commission to look into the matter or, after the record had been certified, to request the court of appeals to remand to the Commission for a hearing on the question.

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on between El Paso Natural Gas Co. and Pacific Northwest Pipe Line Corp.?

Mr. KLINE. That is true.

Mr. LISHMAN. Wasn't there discussion of an antitrust suit being brought by the Department of Justice?

Mr. KLINE. That is true during all of this period, but I do not believe Mr. Wimberly ever discussed any phase of that case with me at any time. He has never at any time approached me improperly and I don't believe he ever discussed a case while it was pending in any manner with me.

The most that the Congressional hearings show is that, during the pendency of this case before the Commission, persons who represented El Paso had discussions with certain commissioners with respect to matters other than this case. We know of no rule of law, however, that automatically outlaws all social contacts or general discussions of industry problems, not related to a particular pending case, between representatives of a litigant and members of the agency. On the contrary, the court below, which has been particularly sensitive to protecting the integrity of the administrative process against improper *ex parte* contacts,[29] held *en banc* (unanimously on this issue) that a general discussion of an industry problem between industry representatives and agency members did not constitute improper *ex parte* contacts with respect to a particular case involving that problem. *Van Curler Broadcasting Corp.* v. *United States*, 236 F. 2d 727.

[29] *WKAT* v. *Federal Communications Commission*, 258 F. 2d 418; *Massachusetts Bay Telecasters* v. *Federal Communications Commission*, 261 F. 2d 55; *WORZ Inc.* v. *Federal Communications Commission*, 268 F. 2d 889, motion for leave to file petition for writ of mandamus denied, 361 U.S. 805; *Sangamon Valley Television Corp.* v. *United States*, 269 F. 2d 221; *WIRL Television Co.* v. *United States*, 274 F. 2d 83; *United Air Lines* v. *Civil Aeronautics Board*, 281 F. 2d 53.

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

RALPH S. SPRITZER,
General Counsel,

HOWARD E. WAHRENBROCK,
Solicitor,

ARTHUR H. FRIBOURG,
Attorney,
Federal Power Commission.

FEBRUARY 1962.

APPENDIX A

Letter From the Chairman of Federal Power Commission to Judge Willis W. Ritter

Oct. 7, 1958.

The Honorable Willis W. Ritter,
United States District Judge,
Federal Building,
Salt Lake City, Utah.

Re: Civil Action 143–57
United States District Court, Utah
United States v. El Paso Natural Gas Company and Pacific Northwest Pipeline Corporation

Dear Judge Ritter:

On August 7, 1957, petitions were filed with Federal Power Commission under Dockets Nos. G–13018 and G–13019 seeking approval of a proposal of merger between El Paso Natural Gas Company and Pacific Northwest Pipeline Corporation. In the course of their investigation of this matter, our staff received indications that Pacific Northwest Pipeline Corporation could be in precarious financial straits which could be remedied by the proposed merger and that an early determination of the proposal would be advisable. We were also urged by the public utility commissioners of Washington, Oregon, Nevada and New Mexico, among other parties, to proceed with the hearing as early as possible.

staff investigation and the pleas of the various public

We were advised by the United States Department of Justice that there was pending before your Court the civil action mentioned in the caption of this letter involving alleged violations of the Clayton Act by El Paso and Pacific Northwest and we were requested to stay proceedings before this Commission until the Court proceedings were completed. In view of the urgency of the matter, as indicated by our bodies, we felt that it was proper for us to proceed with the testimony in our cases and to determine at the time of considering the merits of the case whether the application for merger should await the judicial determination of the anti-trust charges.

Our hearings were then set for trial and the Department of Justice was invited to participate to such extent as it deemed appropriate. The proponents' principal case has been heard and more than a thousand sheets of testimony has been transcribed and the matter has been re-set for November 12 for testimony by the opponents and for cross-examination of the applicants' witnesses.

The Department of Justice did not intervene in the proceedings before this Commission but they have now written us a letter advising us that the anti-trust case has been fixed for trial before you on Noveber 17, 1958, with a pretrial conference set for November 3 and they have requested that we continue the hearings in our proceedings from November 12, 1958, to December 15, 1958.

Since the Department of Justice is not a party to our proceedings, they would have no right to make a motion for continuance of the proceedings but, of course, this Commission could continue the proceedings on its own initiative upon a proper showing. We would hesitate to do this without giving all parties an opportunity to be heard. We understand that El

Paso filed in your Court on October 2, 1958, a motion to postpone the anti-trust trial and that this motion will be before you and you will have an opportunity to hear both parties on this question as to whether we should proceed with the merger hearing or you should proceed with the anti-trust case. Since there is no manner in which both parties can be heard before this Commission within that time, we will be very happy to defer to your decision. If you deny El Paso's motion and decide to proceed with the anti-trust trial, we will continue our merger proceedings to a date which will not conflict with your Court trial. If you sustain the motion of El Paso for a continuance, we will proceed with our hearings.

We will appreciate your asking the Clerk of your Court to advise us what decision you reach on El Paso's motion to postpone the anti-trust trial.

Sincerely yours,

/s/ JEROME K. KUYKENDALL,
Chairman

[cc:
El Paso Natural Gas Company
El Paso, Texas
Dept. of Justice, Washington, D.C.]

APPENDIX B

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

Before Commissioners: JOSEPH C. SWIDLER, *Chairman;* JEROME K. KUYKENDALL, HOWARD MORGAN, L. J. O'CONNOR, JR. and CHARLES R. ROSS.

Humble Oil & Refining Company. Docket No. CI62-627

ORDER TO SHOW CAUSE AND FIXING DATE FOR HEARING

(Issued December 13, 1961)

It has come to the attention of the Commission (through published reports in various journals of the oil and gas industry) that Humble Oil & Refining Company (Humble), a natural-gas company heretofore found subject to the jurisdiction of the Federal Power Commission (14 FPC 1193), has announced a plan to acquire the assets of Olin Oil & Gas Corporation (Olin Oil & Gas) through an exchange of stock for the assets of the latter company. It appears that a vote by the stockholders of Olin Oil & Gas to consummate the proposed transfer of assets to Humble is imminent.

Olin Oil & Gas Corporation is a Delaware corporation with its principal place of business at 1700 Commerce Building, New Orleans, Louisiana. On December 29, 1953, Olin Oil & Gas acquired the entire capital stock of Olin Interstate Corporation, a natural-gas

transmission company (17 FPC 686), which subsequently changed its name to Olin Gas Transmission Corporation (Olin Gas Transmission). Olin Gas Transmission is engaged in the interstate transportation and sale of natural gas subject to the jurisdiction of the Federal Power Commission and is a wholly-owned subsidiary of Olin Oil & Gas. (17 FPC 697.)

Section 7(c) of the Natural Gas Act provides that "No natural-gas company * * * shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, *or acquire or operate any such facilities* * * * unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity." [Emphasis added.] The proposed acquisition by Humble of the facilities of Olin Gas Transmission through the purchase of the assets of Olin Oil & Gas may be subject to the Commission's jurisdiction under Section 7(c) of the Act.[1]

Humble has not filed any application pursuant to Section 7 of the Natural Gas Act for permission to acquire the facilities of Olin Gas Transmission, which acquisition will result from the exchange of stock between Humble and Olin Oil & Gas.

The Commission finds:

It is necessary and appropriate in the public interest and for the purpose of carrying out the provisions of the Natural Gas Act, particularly Section 7 thereof, that proceedings be instituted by the Commission, on its own motion, requiring Humble Oil & Refining Company to show cause, if any there be, why it should not be required to comply with the provisions of the

[1] Cf., *People of the State of California* v. *F.P.C.* and *El Paso Natural Gas Company* (No. 15687 in USCA, DC) decided March 30, 1961.

Natural Gas Act and why it should not file an application pursuant to Section 7(c) thereof to acquire by stock ownership the facilities of Olin Gas Transmission.

The Commision orders:

(A) Humble Oil & Refining Company shall show cause, if any there be, at the hearing directed in paragraph (B) hereof, why it should not be required forthwith to comply with all of the provisions of the Natural Gas Act, including, particularly, Section 7(c) thereof and why it should not file an application for a certificate of public convenience and necessity to acquire by stock ownership the facilities of Olin Gas Transmission.

(B) Pursuant to the authority contained in, and subject to the authority conferred upon the Federal Power Commission by the Natural Gas Act, including particularly Sections 7, 14, 15, and 16, and the Commission's Rules and Regulations under that Act, a public hearing shall be held commencing March 27, 1962 at 10:00 a.m. (EST), in a hearing room of the Federal Power Commission, 441 G Street, N.W., Washington, D.C., concerning the matters involved and the issues presented in this proceeding, as set forth in paragraph (A) hereof.

By the Commission.

JOSEPH H. GUTRIDE,
Secretary.

[Immediate Release. Federal Power Commission, Docket No. C162-627. Release No. 11,761. G-6297]

FPC ORDERS HUMBLE OIL & REFINING TO SHOW CAUSE WHY IT SHOULD NOT OBTAIN AUTHORIZATION FOR ACQUISITION OF OLIN STOCK

WASHINGTON, D.C., December 13, 1961.—The Federal Power Commission today ordered Humble Oil &

Refining Company, of Houston, Tex., to show cause why it should not file an application to obtain FPC authorization for its proposed acquisition by stock ownership of the properties of Olin Gas Transmission Company, of Monroe, La., an interstate pipeline company.

A public hearing will commence March 27 in Washington, D.C.

The Commission said it had learned through published reports that Humble was planning to acquire the stock of Olin Oil & Gas Corporation, of New Orleans, La., which is Olin Gas Transmission's parent. Both Humble and Olin Gas Transmission are now subject to FPC jurisdiction.

The Commission pointed out that the Natural Gas Act provides that no natural gas company shall acquire or operate jurisdictional facilities unless an FPC certificate is in force. The Commission said Humble's proposed acquisition may be subject to FPC jurisdiction under this provision of the Gas Act, as in substance an acquisition of the underlying facilities of Olin Gas Transmission.

In a separate action, the Commission adopted the following statement for issuance as part of the press release announcing the show cause order:

"A change in the ownership of pipeline facilities is a matter of regulatory concern. Like other types of carriers, the pipelines form the nexus between producers and the consuming public. Since the public convenience and necessity do not ordinarily justify duplication of pipeline facilities, the certificated pipeline normally has a monopoly or near-monopoly position in terms of the service which it performs. In these circumstances, it becomes important that the Commission consider whether it has jurisdiction to determine the effect upon the public of a change in

real or beneficial ownership. We emphasize that the announcement implies no prejudgment either on the jurisdictional question or on the merits of the Humble proposal.

"We wish to explain further that we are raising no jurisdictional question insofar as there is a change in the ownership of the stock of a producer of natural gas. The jurisdictional facilities of a producing company characteristically represent a small fraction of such a company's total properties. These facilities, moreover, are not involved in the performance of a carrier function. In this area, the Commission requires merely that the owner of record hold a certificate for the jurisdictional facilities involved."

For further information call DUdley 6-6102.

U.S. GOVERNMENT PRINTING OFFICE: 1956